A CONCISE TREATISE
ON THE
LAW AND PRACTICE
OF
CONVEYANCING &c.
BY
RICHARD HALLILAY.


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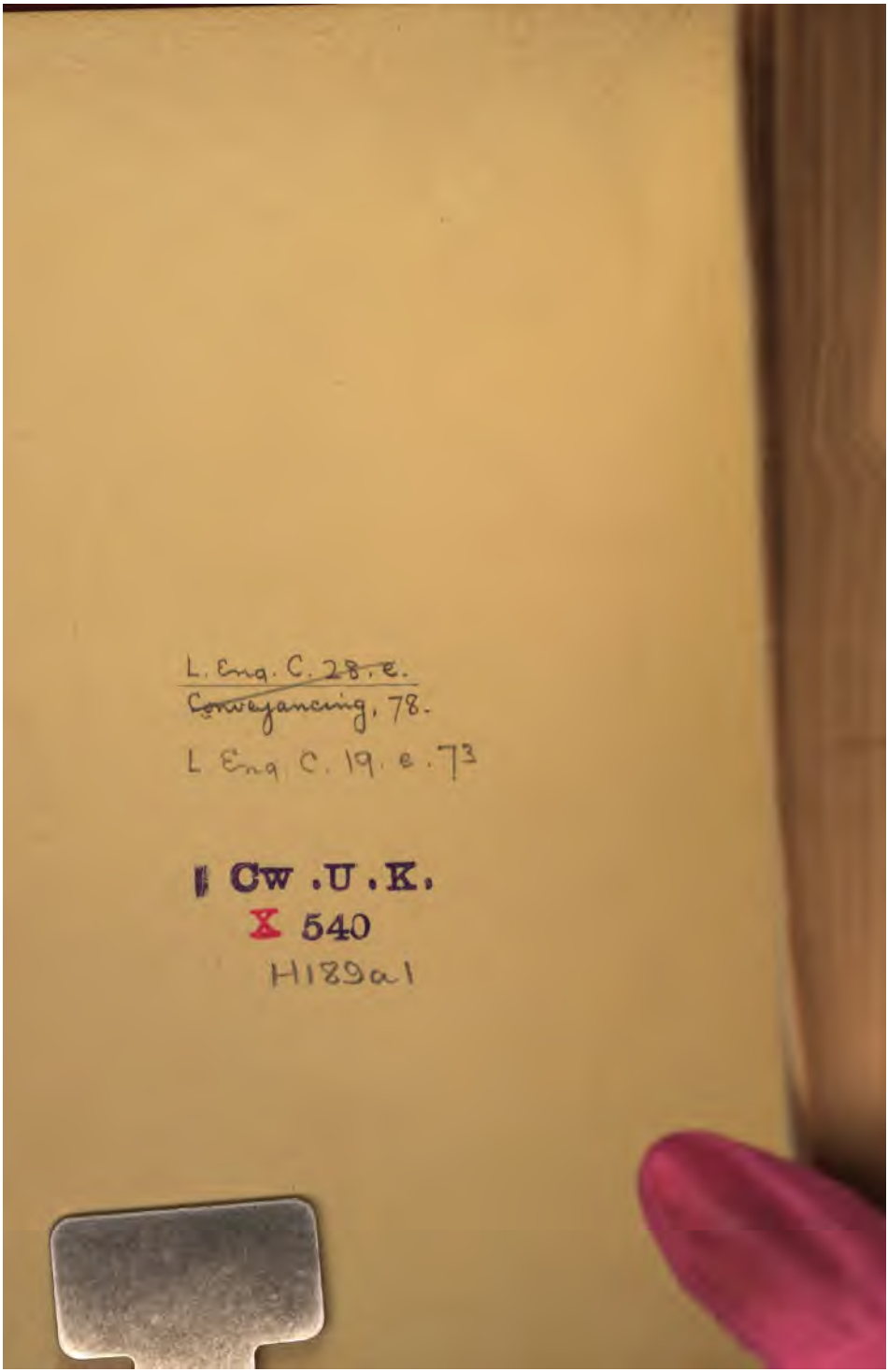

A CONCISE TREATISE

ON THE

Law and Practice

OF

CONVEYANCING.

TOGETHER WITH

THE SOLICITORS' REMUNERATION ACT, 1881

(44 & 45 VICT. C. 44),

AND THE

ORDERS ON CONVEYANCING FEES AND CHARGES.

BY RICHARD HALLILAY, ESQ.,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW, LATE HOLDER OF AN EXHIBITION AWARDED BY THE COUNCIL OF LEGAL EDUCATION, AND ALSO OF THE STUDENTSHIP OF THE FOUR INNS OF COURT.
AUTHOR OF "A DIGEST OF THE EXAMINATION QUESTIONS AND ANSWERS," ETC.

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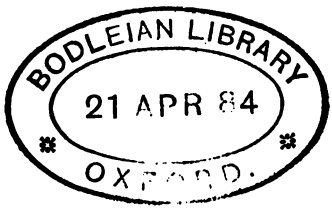

PREFACE.

THIS short treatise has been written in the hope that it will not only be found useful to the student who is preparing for his examination on that branch of law and practice to which the work relates, but that it will also be of service to the young solicitor while conducting the ordinary duties of a conveyancing practice.

The changes made in the law by the Conveyancing Acts, 1881, 1882, the Settled Land Act, 1882, the Bills of Sale Amendment Act, 1882, the Married Women's Property Act, 1882, and the rules and orders made under these Acts, and the decisions thereon, have been carefully noted.

In the Appendix will be found the Solicitors' Remuneration Act, 1881, and the general order made thereon; also the new Rules under the Fines and Recoveries Act, and sect. 7 of the Conveyancing Act, 1882, and the order as to court fees.

R. H.

THE TEMPLE,
April, 1883.

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ERRATA ET ADDENDA.

Page 3, line 3, *for* "sale by," *read* "sales by."

Page 14, line 21, *for* "acquisitions," *read* "requisitions."

Page 18, note (*b*), *for* "*Garbside* v. *Pillstone Coal Company*," *read* "*Gartside* v. *Silkstone and Dodworth Coal Company*."

Page 26, note (*c*), *for* "*Thompon* v. *Cartwright*," *read* "*Thompson* v. *Cartwright*."

Page 31, line 21, *after* the words "of it," *add*, "however, the Court of Appeal has now held that, as a contract of insurance is a contract of indemnity and nothing more, and as the defendants had received the full amount of the purchase money as well as the insurance money, the insurance company were entitled to recover the amount which they had paid to the defendants as compensation for the damage sustained by fire (*Castelain* v. *Preston and others*, 18 L. J. N. Ca. 34.) But this does not alter the proposition laid down in the text. It is a question between the insurance company and the insured."

Page 61, line 18, *for* "provision," *read* "provisions."

Page 107, line 29, *for* "change of," *read* "charge of."

Page 134, line 24, *after* "without," *add* "the underlessee."

Page 143, note (*d*), *for* "*Blake* v. *Blake*, 46 L. T., N. S. 641," *read* "*Re Johnson*; *Golden* v. *Gillan*, L. R. 20 Ch. D. 389.

Pages 148, 150, 160, 162, 164, as to where a tenant for life of settled land wishes to exercise his statutory power of sale, and there are no trustees of the settlement to whom notice can be given, see *Wheelwright* v. *Walker*, 48 L. T., N. S. 70.

Page 158, line 31, *for* "or to," *read* "and to."

A CONCISE TREATISE

ON THE

LAW AND

PRACTICE OF CONVEYANCING.

CHAPTER I.

OF THE MODES OF ACQUIRING, AND OF THE CAPACITY TO CONVEY AND PURCHASE REAL ESTATE.

The different modes by which property can be acquired may be divided into two great classes—viz., title by purchase and title by descent. A title by purchase is said to include in its scope that of occupancy, conveyance, devise, forfeiture, partition, elegit, bankruptcy, and inclosure. And title by descent, it is said, includes not only cases where the property is cast upon the heir on intestacy, but also escheat, dower, and curtesy. However, it may be doubted whether descent includes escheat, dower, and curtesy; and whether purchase includes inclosure, elegit, and bankruptcy. It is, therefore, more comprehensive to classify the modes by which property may be acquired into title by the act of law and title by the act of the parties.(*a*)

As to the persons who may convey and purchase real estate, as a general rule, all persons of full age and sound

(*a*) See 1 Steph. Com., ch. 10.

mind may alien their lands. To this rule there were certain exceptions. Thus, attainted persons, though they might purchase lands, were disabled from holding them, the lands so purchased being subject to escheat and forfeiture. They were also incapable of conveying so as to affect the Crown and the lord, and that, from the time of the offence committeed, for such conveyance might tend to defeat the right of the Crown or of the lord.(*a*) By the 33 & 34 Vict. c. 23, however, it is enacted that conviction for treason or felony shall no longer cause attainder, forfeiture, or escheat; but this act is not to affect forfeiture consequent upon outlawry: (sect. 1). By sect. 8, however, such convicts are prevented from alienating during the period of their sentence. By the 42 & 43 Vict. c. 59, outlawry in a civil action is abolished.

Corporations, religious or others, may purchase lands, yet unless they have a license to hold in mortmain they cannot retain such purchase, it being forfeited to the lord of the fee. As to their power of alienation, they might in general at common law make estates at their pleasure of lands and tenements they held in their corporate right, though as to ecclesiastical corporations sole this power was somewhat restricted, and is now regulated by statute.(*b*)

As to municipal corporations, they may, by the 45 & 46 Vict. c. 50, contract for the purchase of and hold land not exceeding, in the whole, five acres, either in or out of the borough, and build thereon a town hall, council house, or other building necessary for borough purposes: (sect. 105). And where a municipal corporation has not power to purchase or acquire land, or to hold land in mortmain, the council may, with the approval of the Treasury, purchase or acquire and hold any land, in such manner and on such terms and conditions as the Treasury approve. The provisions of the Land Clauses Consolidation Acts, 1845, 1860, and 1869, relating to the purchase of land by agreement, &c., are to

(*a*) 1 Steph. Com. 470, 8th ed.
(*b*) See 1 Steph. Com. 470, 8th ed.

extend to all purchases of land under this section: (sect. 107).

As to sale by such corporations, the council cannot, unless authorised by Act of Parliament, sell, mortgage, or alien any corporate land without the approval of the Treasury, except the making of such leases as are specified in this section, to which the reader is referred: (sects. 108, 109).

The conveyances of idiots, lunatics, and insane persons (except during a lucid interval) are also, generally speaking, void.(*a*)

The conveyances and purchases of infants are, in general, not void, but voidable; and they may be avoided either by themselves in their lifetime, or by their representatives after their death.(*b*)

By the 18 & 19 Vict. c. 43, however, male infants, not under twenty years of age, and female infants, not under seventeen years of age, may, with the sanction of the Chancery Division of the High Court, make a valid settlement or contract for a settlement on marriage of his or her real or personal estate, which is as effectual as if the infant were of full age. And the 45 & 46 Vict. c. 38, ss. 59, 60, facilitates sales of settled land by infants in possession. These statutes will, however, be fully treated of in subsequent pages.

The power of a married woman to convey her property varies with the time, and the mode of acquiring such property. By the 45 & 46 Vict. c. 75 (Married Women's Property Act, 1882), every woman who marries *after* the commencement of the Act (1st January, 1883) is entitled to have and to hold as her separate property all real and personal property which belongs to her at the time of marriage, or is acquired by or devolves upon her after marriage, &c.; and she may dispose thereof by will or otherwise in the same manner as if she were a *feme sole*: (sects. 1, 2). And every woman married *before* the commencement of this Act, is entitled to have and

(*a*) 1 Steph. Com. 471, 8th ed.
(*b*) 1 Steph. Com. 471, 8th ed.; see also 37 & 38 Vict. c. 62.

to hold and to dispose of, in manner aforesaid as her separate property, all real and personal property, her title to which, whether vested or contingent, in possession, reversion, or remainder, accrues *after* the commencement of this Act: (sect. 5).

Sect. 19, however, provides that nothing in the Act is to interfere with or affect any settlement or agreement for a settlement made or to be made, before or after marriage, respecting the property of any married woman, or is to render inoperative any restriction against anticipation at present attached or hereafter to be attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will or other instrument.

And under the 20 & 21 Vict. c. 85, ss. 21, 25, and 41 Vict. c. 19, s. 4 (Divorce and Matrimonial Causes Acts) a married woman may acquire the status of a *feme sole*.

And by the 44 & 45 Vict. c. 41, s. 39, although a married woman is restrained from anticipation, the court may, if it thinks fit, when it appears to be for her benefit,(*a*) by judgment or order, with her consent, bind her interest in any property.

And the 37 & 38 Vict. c. 78, s. 6, enacts that where any freehold or copyhold hereditaments are vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a *feme sole*.

And where property is settled to the separate use of a married woman, without any restraint or alienation, she has, as incident to such estate and without any express power, a complete right of alienation by instrument *inter vivos* or by will.(*b*)

And by the 45 & 46 Vict. c. 38, s. 61, sub-ss. 2, 6, where a married womma who, if she had been unmarried, would have been a tenant for life of settled property, is entitled for

(*a*) As for the payment of her debts, see *Hodges* v. *Hodges*, 46 L. T., N. S. 366; 20 Ch. Div. 749.

(*b*) *Taylor* v. *Meads*, 12 L. T., N. S. 6; 11 Jur. N. S. 166; 13 W. R. 394.

her separate use, or is entitled under any statute for her separate property, or as a *feme sole*, then she without her husband has the powers of a tenant for life under the Act (*a*), and a restraint on anticipation in the settlement is not to prevent the exercise by her of any power under the Act. And by the 3 & 4 Will. 4, c. 74, s. 24, where the estate constituting a married woman protector of a settlement is settled to her separate use she may consent to an alienation without her husband's concurrence therein.(*b*).

Where a married woman has an interest in property not coming within the cases above enumerated, she must transfer such interest by deed acknowledged with her husband's concurrence therein, unless such concurrence be dispensed with by the court.(*c*)

Formerly an *alien* could not, even though the subject of a friendly state, hold real estate here unless under a mere lease taken for the residence or occupation of himself or his servants, or for the purpose of trade or business, for a term not exceeding twenty-one years. The conveyance to an alien of any greater estate in lands was a cause of forfeiture to the crown, who after office found might have seized the lands.(*d*) By the Naturalisation Act, 1870, however, it is provided that real and personal property of every description (except a British ship) may be acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from or in succession to an alien in the same manner as through, from, or in succession to a natural-born British subject.(*e*)

Purchases by trustees and others filling a fiduciary character will be treated of in a subsequent chapter.(*f*)

(*a*) See *post*, tit. "Settlements."
(*b*) See *Kerr* v. *Brown*, 33 L. T. 179.
(*c*) See 3 & 4 Will. 4, c. 74, ss. 24, 79, 91; 20 & 21 Vict. c. 57; 45 & 46 Vict. c. 39, s. 7.
(*d*) Will. Real. Pro. 65, 13th ed.; Broom's Const. Law, 4, note (*q*).
(*e*) 33 Vict. c. 14, ss. 2, 14. (*f*) See *post*, tit. "Purchases."

It may be useful to mention briefly some leading rules for the construction of written documents: It is a rule that parol evidence cannot be received to contradict, vary, add to, or subtract from the terms of a valid written instrument; although such evidence may be used to explain it.

If there be two clauses in a deed so totally repugnant to each other that they cannot stand together, the first is received and the latter rejected. But in the case of a will the rule seems to be different.(*a*) And even in a deed, though the habendum cannot abridge an estate limited by the premises, yet it may qualify such estate. Thus, if an estate be given to a man and his heirs, habendum to him and the heirs of his body, he will take only an estate tail, because the habendum may qualify the word "heirs" to mean heirs of the body.(*b*)

Ambiguous words are taken most strongly against the grantor and in favour of the grantee. This rule, however, being of some strictness, is only resorted to when all other rules of exposition fail; nor does it apply to a grant by the Crown, at the suit of the grantee.(*c*)

In the absence of evidence to the contrary, there is a legal presumption that a man knows the contents of a deed which he executes.(*d*)

(*a*) 1 Steph. Com. 498 and note, 8th ed.
(*b*) 1 David. Conv. 101, 103, 4th ed.
(*c*) 1 Steph. Com. 499, 8th ed.
(*d*) Per Jessel, M.R., in *Re Cooper*; *Cooper* v. *Vesey*, L. Rep. 20 Ch. Div. 611, 635.

CHAPTER II.

SALES.

SALES of real estates are made either by public auction or by private treaty.

On a sale by public auction, the property which is the subject of the sale is usually described in a printed statement called *particulars of sale*, and this is accompanied by another statement specifying the terms subject to which the sale is made, termed *conditions of sale*.

On a sale by private treaty the only difference is that the contract or agreement of sale takes the place of the conditions of sale, and of course no auctioneer is required.

Before a solicitor, acting on behalf of a vendor, is in a position to prepare the particulars of sale and the conditions or contract of sale, he must investigate the title to the property which is to be the subject of the sale. For this purpose he must carefully peruse the title deeds and documents relating to the property it is proposed to sell. If, on such perusal and investigation, he finds defects, he must ascertain whether they are such as can be remedied or not. If a defect in the title turns out to be irremediable, the solicitor must then consider whether it is advisable to offer the property for sale subject to the defect or incumbrance, or to abandon the contemplated sale: for to place property on the market with a defective title might be affording information to, and putting parties on the alert, who, hitherto ignorant of any real or supposed rights they may have in the property, might now involve the estate in litigation and expense.

And when a title is sound it is necessary, notwithstanding recent legislation in favour of vendors, that a solicitor should

protect his client from unnecessary requisitions and cost in the deduction of such title. For it sometimes happens that the deeds abstracted are lost, or the vendor may be unable to compel their production, or that some of the deeds are unstamped or unregistered. And other points may arise on the title which would entail heavy outlay and cost on the vendor to clear up in proportion to the amount of the purchase-money; or he may even lose the whole of the purchase-money thereby; yet a purchaser, in the absence of proper stipulation to the contrary would have a right to insist on the title being made good, and the purchase completed.(*a*)

A recent case fully illustrates the foregoing remarks: A vendor was selling as mortgagee. Amongst the conditions was the usual one, that if the vendor was unable or unwilling to answer any requisition, or remove any objection raised by a purchaser as to the title he was to be at liberty to rescind the contract of sale. After the abstract of title was delivered the purchaser discovered, what had not been discovered by the vendor, that the property was subject to a prior mortgage, and the vendor being unable or unwilling to answer the requisition made by the purchaser, that he should pay off the first mortgage, claimed to rescind the contract of sale. However, it was held that the vendor had no right to rescind the contract. The abstract of title did not disclose the fact which the purchaser afterwards discovered of there being a prior mortgage, which was a very serious objection to the title, and the vendor's ignorance thereof did not exonerate him from complying with the requisition because the charge would have to be paid out of the purchase-money. There is no hardship the court said upon the vendor, and the contract must be completed, and the costs paid by the vendor.(*b*)

The estate or interest the vendor has in the property, and his power of disposition over it must also be ascertained. If

(*a*) See 1 Prid. Conv. 1 *et seq.*, 11th ed.; 1 Dart V. & P. 109, *et seq.*, 5th ed.

(*b*) In *Re Jackon and Oakshot*, L. Rep. 14 Ch. Div. 851.

it is found that he takes only a joint or limited interest in the property,(*a*) it should be considered whether such interest would not sell more advantageously if the concurrence of other parties interested in the property could be obtained. As if an intending vendor be a joint tenant, or tenant in common, or a tenant for life merely.

If the estate it is proposed to sell is found to be incumbered, it must be ascertained if the incumbrances are matters of conveyance only, which the vendor has the power to clear off, as a mortgage; or are matters of title, which he cannot compel the incumbrancer to release, as a jointure. In the latter case, if the jointress will not voluntarily release her jointure, the estate must be sold subject to the incumbrance.(*b*)

A purchaser may by private arrangement be content to accept a defective title with an indemnity, yet it is clear that neither vendor or purchaser have a right to insist upon a contract being completed upon such terms in the absence of agreement.(*c*)

If there be any doubt as to the extent and value of the property, it should be surveyed and valued by a competent surveyor and valuer.

If the sale is to be by public auction the solicitor must first engage the services of a well-known and respectable auctioneer, and give him instructions for the sale. In London and its neighbourhood, the auctioneer will inspect the property, and obtain all necessary information for framing the particulars of sale, which, when done, he will forward to the solicitor to settle. In many country towns, however, this is done by the solicitor himself.

Great care must be taken in framing the particulars of sale as a substantial misdescription of the property, or a concealment of defects, if wilfully done, might afford an unwill-

(*a*) As to the powers of limited owners over settled land, see *post*, tit. "Settlements."
(*b*) 1 Dart's V. & P. 281, 284, 5th ed.
(*c*) 1 Dart's V. & P. 157, 1070, 5th ed.

ing purchaser ground for rescinding the bargain (*a*). Therefore where an estate was described to be but one mile from a borough town, whereas it was four miles distant, the contract was set aside.(*b*)

If, however, there be no misrepresentation, and no effort made during the treaty to prevent a purchaser from seeing a defect which might have been discovered, the contract will be binding if the defects were such as might have been discovered by a diligent man. But where a seller plastered up a defect in a main wall, and papered it over so as to conceal the defect, the purchaser was relieved from the contract.(*c*)

So if there is a *latent* defect on the estate, which a purchaser could not discover by any attention whatever, the vendor is, it would appear, bound to disclose it to him, even if the estate be sold expressly subject to all faults.(*d*)

And a clause expressly stipulating that error in description of the estate shall not annul the sale, will not protect a vendor against a misdescription made with a fraudulent intent.(*e*)

Generally speaking, however, misdescription in the particulars as to quantity is considered as a fit matter for compensation.(*f*) And if the vendor cannot make a good title to the whole of the property, and the part to which a title cannot be made is not necessary to the enjoyment of the rest of the property, the contract will be enforced, and a proper abatement allowed to the purchaser out of the purchase-money. Yet a purchaser will not be compelled to take an undivided

(*a*) *Re Bannister*, 40 L. T., N. S. 828; Dart's V. & P. 109, *et seq.*, 5th ed.; *Redgrave* v. *Hurd*, L. Rep. 20 Ch. Div. 1.

(*b*) *Duke of Norfolk* v. *Wortley*, 1 Camp. N. P. C. 337; *Cox* v. *Middleton*, 23 L. T. 6.

(*c*) Lord St. Leonards' Handy Book, 14, 15.

(*d*) Lord St. Leonards' Handy Book, 15; 1 Dart's V. & P. 92, 93, 5th ed.

(*e*) *Duke of Norfolk* v. *Wortley*, 1 Camp. N. P. Ca. 337.

(*f*) Story's Eq., s. 747 *et seq.*; *Barrow* v. *Scammell*, 45 L. T., N. S. 606; *Goddard* v. *Geffrys*, *id.*, 674.

part of an estate, as, where it is held in tenancy in common, if he contracted for the entirety. Nor will he be compelled to take a leasehold estate, however long the term may be, nor a copyhold, if the particulars described the estate as a freehold.(*a*)

However, if the vendor misrepresent the nature of the property, the purchaser will not be relieved if he bought with full knowledge of the actual state of it, as where the vendor described the estate to be in a ring fence and the purchaser knew it was intersected with other lands.(*b*)

Still it is not safe for a vendor to rely upon a purchaser's knowledge in opposition to his own statement.(*c*)

The same rules apply to incumbrances on the estate as to defects in the estate. The amount of the incumbrances should be set out accurately, and the amount of the charge clearly defined, so that a purchaser cannot be misled. For if omitted or misstated, and the incumbrance be one of title, the purchaser may rescind the contract, and cannot be compelled to take the estate, even with a compensation.(*d*) And both the vendor and his solicitor who fraudulently keep back any instrument material to the title of the property sold is guilty of a misdemeanor punishable by fine, or imprisonment for two years, with or without hard labour, or by both. The prosecution must, however, be with the consent of the Attorney or Solicitor-General.(*e*)

But a vendor may praise or puff his property, although contrary to truth. He may affirm the estate to be of any value he may choose to name; for it is deemed a purchaser's own folly to credit a bare assertion like this. Again, a vendor may with impunity describe his land as rich water meadow

(*a*) Lord St. Leonards' Handy Book, 7, 8; 1 Dart's V. & P. 107, 5th ed.; Sug. Conc. V. & P. 221, 225.

(*b*) Lord St. Leonards' Handy Book, 16; 1 Dart's V. & P. 100, 5th ed.

(*c*) See *Cox* v. *Middleton*, 23 L. T. 6.

(*d*) See Lord St. Leonards' Handy Book, 17.

(*e*) 22 & 23 Vict. c. 35, s. 24; 23 & 24 Vict. c. 38, s. 8.

land, although it is imperfectly watered. So he may state the fine payable for renewing a leasehold interest to be small, when it is really of considerable amount. Yet he must not, in answer to inquiries, assert contrary to the fact that the house is not damp. And he must disclose any right of sporting over the estate, or any right of common over it, or any right to dig for mines upon it. But he need not disclose that there is a right of way over the property, as this is not a latent defect, and the purchaser ought to inquire.(*a*)

If a purchaser makes a mistake as to the property he bought from his own gross negligence, he cannot on that ground resist specific performance of the contract.(*b*)

The particulars of sale having been drawn and settled, the next step is to prepare the conditions of sale.

Since the operation of the Vendor and Purchaser Act, 1874, and the Conveyancing Acts, 1881, 1882, contracts or conditions of sale need not contain stipulations as regards *title* and evidence of title except in very special cases, as where the title is less than forty years, or where the deeds abstracted cannot be produced, &c. An open contract—that is, one without stipulations—may be used in case of an ordinarily good forty years' title.(*c*)

The ordinary conditions of sale will now be to the following effect:

1. That the highest bidder be the purchaser, subject to the right of the vendor to bid by himself or his agent up to the reserved (*d*) price; and in case of dispute to be put up again at last undisputed bidding.

2. As to the payment of a deposit by the purchaser, the

(*a*) See Lord St. Leonards' Handy Book, 17, 18, 26.

(*b*) *Goddard* v. *Jeffreys*, 45 L. T., N. S. 674.

(*c*) See 37 & 38 Vict. c. 78, s. 1; 44 & 45 Vict. c. 41, s. 3; 45 & 46 Vict. c. 39, s. 4; Wolstenholme and Turner's Conv. Acts, p. 1, &c.

(*d*) By the 30 & 31 Vict. c. 48, ss. 4 and 5, the conditions of sale by auction of any land must state whether there is a reserved price and a right to bid, or whether it is sold without reserve. In the latter case it is illegal to appoint a puffer.

time for completion of the purchase and paying the remainder of the purchase-money.

3. That if the completion of purchase delayed by other than wilful default on the part of the vendor, the purchaser shall pay interest at the rate of £5 per cent.

4. As to delivery of requisitions on the title within a fixed time, and subject thereto, the title is to be deemed to be accepted. And if vendor is unable or unwilling to answer any requisition, he may rescind the contract and return the deposit without interest or costs, and the purchaser to return the abstract of title.

If there is any doubt as to the vendor's ability to make out and deliver a sufficient abstract by a specified day, it is better that no time should be specified for delivery by the vendor of the abstract of title, lest he should fail in doing so within the time named, or should deliver an imperfect abstract.(*a*)

5. Error in description not to annul the sale, &c.

6. Conveyance to be prepared by and at the purchaser's expense.

7. That the vendor may re-sell in case of default by the purchaser, and the deposit to be forfeited, and any loss on a re-sale to be recovered as liquidated damages.

A memorandum of purchase follows, sales of land coming within the 4th sect. of the Stat. Frauds (29 Cas. 2, s. 3). This memorandum must contain either the names of the contracting parties or such a description of them as sufficiently identifies them. The term "vendor" is not of itself a sufficient description of one of the contracting parties.(*b*)

The foregoing will now be the ordinary conditions of sale of land by auction.(*c*)

(*a*) See Dart's V. & P. 125, 5th ed.

(*b*) *Potter* v. *Duffield*, L. Rep. 18 Eq. Ca. 4; *Thomas* v. *Brown*, L. Rep. 1 Q. B. Div. 714.

(*c*) See Forms of Conditions, 1 Prid. Conv. 1, *et seq.*, 11th ed.; Wolstenholme and Turner's Conv. Acts, 110, *et seq.*

There are many cases, however, in which special conditions will still be necessary. We may instance the following:

(1) Where timber on the estate sold is to be paid for separately from the land.

(2) Where the title cannot be carried back forty years.

(3) When it is necessary to prevent a purchaser calling for evidence of seizin when the abstract commences with a will.

(4) Where documents subsequent to the commencement of the title cannot be produced.

(5) Where deeds are not properly stamped, or are not registered when the lands sold lie in a register county.

(6) Where any difficulty as to identifying the property is likely to arise.

(7) To give the purchaser the benefit of any fire insurance.(*a*)

(8) Where a vendor retains the title deeds to provide for a statutory acknowledgment of the right of purchaser to production and to delivery of copies.

No doubt there may be many other cases where it will be necessary, from the state of a title, to protect a vendor against acquisitions thereon.

If a condition of sale directs the deposit to be paid to the auctioneer then, as he is the agent of the vendor, any loss that may arise by his insolvency falls upon the vendor.(*b*)

Upon the sale of leaseholds it was usual, in addition to the ordinary conditions, to stipulate that the purchaser should not investigate or call for the production of the title of the lessor, or his right to grant the lease: also that the last receipt for ground rent should be conclusive evidence that the covenants in the lease had been performed. These conditions are, however, no longer necessary on the sale of leaseholds for years, as the 37 & 38 Vict. c. 78, s. 2, enacts that under

(*a*) See *Raynor* v. *Preston*, L. Rep. 18 Ch. Div. 1; *et post*, tit. "Purchases;" *Castelain* v. *Preston*, L. Rep. 8 Q. B. 613.

(*b*) Lord St. Leonards' Handy Book, 20; 1 Dart's V. & P. 166, 5th ed.

a contract to grant or assign a term of years the intended lessee or assign shall not be entitled to call for the title to the freehold. This section, it will be seen, only protects the title to the *freehold*. Therefore, under an open contract to grant or assign an *underlease*, the right of the immediate lessor to grant such underlease might be inquired into. The 44 & 45 Vict. c. 41, s. 3, sub-ss. 1, 9, 10, however, enacts that under a contract made after the commencement of the Act to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not, in the absence of stipulation to the contrary, have the right to call for the title of the leasehold reversion.

These enactments do not apply to a lease for lives.

The 45 & 46 Vict. c. 39, s. 4, further enacts that where a lease is made under a power contained in a settlement, will, Act of Parliament, or other instrument, any preliminary contract for or relating to the lease, is not, for the purpose of the deduction of title to an intended assign, to form part of the title, or evidence of title to the lease. This applies to leases made either before or after 1st January, 1883.

As to the condition that the last receipt for ground rent should be evidence of the performance of the covenants in the lease, the 44 & 45 Vict. c. 41, s. 3, sub-ss. 4, 5, 9, 10, enact, that as to sales after this Act a lease or underlease is to be deemed *primâ facie* good, the last receipt for rent being evidence of performance of covenants, and in the case of an underlease, of performance of covenants in the superior lease up to the date of the actual completion of the purchase, unless a contrary intention is expressed in the contract of sale.

The particulars and conditions of sale being drawn and settled, a fair copy of each must be made and returned to the auctioneer, who will get them printed and forward proofs to the solicitor for the vendor, who will examine them and ascertain that they are correct. This done, they are returned to the auctioneer, who will cause a sufficient number of copies to be printed from the corrected proofs.

He will also advertise the sale in the proper newspapers, and by placard, and distribute the particulars and conditions of sale in the usual way.

The day of sale having arrived, the solicitor attends at the place of sale to give any information that may be necessary, receive the deposit, and see that the contract of purchase is signed by the purchaser.

If the vendor dies after a valid contract for sale of the fee simple or other freehold interest descendible to heirs general in any land, his personal representatives can, by virtue of the 44 & 45 Vict. c. 41, s. 4, sub-ss. 2 and 3, convey the land for all the estate and interest vested in the vendor at his death. But such a conveyance does not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate. And this section only applies to cases of death after the commencement of the Act.(*a*)

If there is a binding written contract at the time of the death of the vendor, no action will be now necessary to obtain the legal estate where the vendor has devised the land in settlement or otherwise, in such manner that no conveyance can be obtained. But if there be any doubt whether a contract binding on the vendor subsisted at his death, an action will still be necessary. This might happen in case of a parol contract and alleged part performance.(*b*)

We may here state that the requisites of a binding contract for the sale of lands, tenements, or hereditaments, or any interest therein enforceable by an action for specific performance, must be in writing, signed by the party to be charged therewith, or his lawful agent,(*c*) and made between parties able and willing to contract, for a valuable consideration, which must not be illegal or immoral, and the contract

(*a*) The Act commences after the 31st December, 1881.
(*b*) Wolstenholme and Turner's Conv. Acts, 16, 17, n.
(*c*) 29 Car. 2, c. 3, s. 4.

must contain all the terms of the agreement, and be clear and definite.(*a*)

There are circumstances, however, which will take a case out of the statute, and be enforced in an action for specific performance, notwithstanding the absence of a written contract, as when the agreement is set out in the statement of claim, and is admitted by the defendant in his defence, and he does not set up the statute as a bar, or where he has prevented the agreement from being reduced into writing by fraud, or where the parol agreement has been partly performed, as where the purchaser has been let into possession of the property.(*b*)

The property having been sold, the next step is to prepare the abstract of title, if this has not already been done. We will now, therefore, briefly notice the points to be attended to in the preparation of the abstract of title.

The length of time the title is to be carried back will depend upon whether there is a condition or stipulation on the point, or whether the contract is an open one. If there is a stipulation, of course, the title will commence with the document specified as the root or origin of the title. If the contract is an open one, the title to freeholds must be carried back to the legal time for the commencement of an abstract —that is, to some document at least forty years old. As to leaseholds, the abstract will commence with the lease or under lease. As to the freehold interest in enfranchised lands with the deed of enfranchisement.(*c*)

Where a title depends upon a descent, a duly-authenticated pedigree should accompany the abstract of title.

Of course, documents are abstracted according to the priority of their respective dates; but where there are two documents

(*a*) *Cuddee* v. *Rutter*, 1 L. C. Eq. 640, 2nd ed.; *Seton* v. *Slade*, 2 *ib.*, 429, in notes.

(*b*) Story's Eq. ss. 755-768; *Lester* v. *Foxcroft*, 1 L. C. Eq. 625, 2nd ed.

(*c*) See Wolstenholme and Turner's Conv. Acts, pp. 1, 2; 37 & 38 Vict. c. 78, ss. 1, 2; 44 & 45 Vict. c. 41, s. 3; 45 & 46 Vict. c. 39, s. 4.

of the same date, relating to the same property, they should be abstracted according to the order in which they may be presumed to have been executed, as when one deed conveys property and another deed of the same date declares the trusts thereof. Here the deed of conveyance should be abstracted first.(*a*). The court can, however, inquire which deed was executed first.(*b*)

All documents affecting the property (except expired leases) should be abstracted as far as the title is to be carried back,(*c*) otherwise, if any are concealed fraudulently, both the vendor and his solicitor are guilty of a misdemeanour.(*d*)

If the property be of copyhold tenure, the copies of the court rolls affecting it are abstracted, as also all instruments, facts, and proofs necessary to show the equitable title.(*e*)

The amount of stamp duty impressed on the various deeds, &c., should be stated in the margin of the abstract immediately after the date.

If a deed has been abstracted, and is recited in a subsequent deed, it is merely necessary to say, "reciting the before abstracted indenture of the day of , 18 ," giving the date.

If a testatum requires the consideration to be paid in a particular manner, it should be abstracted fully.

If a conveyance abstracted is made by the direction of a particular person, &c., the granting clause should be abstracted so as to show this.(*f*)

Parcels are abstracted fully; but, if no alteration or addition has been made to them by subsequent instruments

(*a*) 1 Hughes Pr. Conv. 110; Sug. V. & P. 407, 14th ed.; but see as to setting out the deed declaring the trusts, 1 Prid. Conv. 85, 11th ed.

(*b*) *Garbside* v. *Pillstone Coal Company*, 21 Ch. Div. 762.

(*c*) See 1 Hughes' Pr. Conv. 111; *Palmer* v. *Locke*, L. Rep. 18 Ch. Div. 381; Sug. V. & P. 407, 14th ed.

(*d*) 22 & 23 Vict. c. 35, s. 24; 23 & 24 Vict. c. 38, s. 8.

(*e*) 1 Prid. Conv. 140, 11th ed.; *et post*, tit. "Copyholds."

(*f*) 1 Hughes' Pr. Conv. 115.

abstracted, it will be sufficient to refer to them as "the before abstracted premises."

Exceptions should be set out *verbatim.*

If there are several habendum clauses in one deed, each should be abstracted.

Trusts that have arisen, or powers that have been executed, must be abstracted fully.

The usual covenants for title may be abstracted briefly; but special covenants should be abstracted fully.

Wills, or more usually probates thereof, are generally abstracted more fully than deeds. And if lands devised by a will lie in one of the register counties and the will has been registered, this fact should be stated.

Matters of fact such as births, deaths, and marriages, and the certificates thereof are set out in the abstract in the order in which they occur.

When the property sold consists of lands of different tenures, as where part is freehold and part copyhold, a purchaser should be furnished with separate abstracts of each distinct species of property.(*a*)

However, by the 44 & 45 Vict. c. 41, s. 3, sub-ss. 7, 9, 10, on a sale of property in lots, made after the commencement of the Act, a purchaser of two or more lots, held wholly or partly under the same title, has no right to more than one abstract of the common title, except at his own expense, unless a contrary intention is expressed in the contract of sale.

Proceedings in bankruptcy should be set out rather fully as the property of a bankrupt vests in the registrar, but subsequently passes to and vests in the trustee on his appointment, and the bankruptcy relates back to the Act of Bankruptcy on which the adjudication is made.(*b*)

The draft abstract having been prepared, a fair copy thereof must be made on brief paper and sent to the solicitor for the purchaser, or to the purchaser himself at the address

(*a*) 1 Hughes' Pr. Conv. 109.
(*b*) See 32 & 33 Vict. c. 71, ss. 11, 17, 83.

given by him if he has no solicitor. A memorandum of the time of delivery of the abstract should be made in case it should be necessary at any time to prove the date of delivery.

The purchaser's solicitor will, in due course, obtain an appointment for the purpose of comparing the abstract with the title deeds and documents. As these are generally in the custody of the solicitor for the vendor the examination and comparison take place at his office. However, the vendor may produce the deeds and documents in his possession for the purpose of examination with the abstract of title, either at his own known residence, or upon or near the estate, or in London; for in the latter case the examination can be made by the London agents of the country solicitors.(*a*)

If the deeds be produced at any of these places, the costs of the examination and the expenses of the journeys, &c., incidental thereto must be borne by the purchaser. If not so produced, the rule was, that all extra expenses occasioned thereby were, in the absence of stipulation to the contrary in the contract or conditions of sale, to be borne by the vendor.(*b*) By the 44 & 45 Vict. c. 41, s. 3, sub-s. 6, however, it is now enacted that on a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosures, awards, records, proceedings of courts, court-rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and of searching, for procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any such documents as above, not in the vendor's possession, if any such production, inspection, journey, &c., is required by a purchaser for verification of the abstract, or for

(*a*) 1 Dart's V. & P. 143, 407, 5th ed.; Prid. Conv. 2, 11th ed.
(*b*) 1 Dart's V. & P. 143, 407, 5th ed.; Prid. Conv. 2, &c., 11th ed.

any other purpose, are to be borne by the purchaser requiring them. And where the vendor retains possession of any document the expenses of making a copy of it, attested or unattested, required by a purchaser, are to be borne by such purchaser.

This sub-section only relates to the expenses in reference to documents which a vendor has not in his possession, but of which he can procure the production. If, however, there are any of which he cannot procure the production, he must protect himself against production by a special condition.(*a*)

And, as will be shown more fully subsequently, recitals of facts in documents as to *land* twenty years old are evidence unless proved to be inaccurate.(*b*) And recitals of documents as to *any property* dated prior to the legal or stipulated time for commencement of the abstract (see *ante*, p. 17), are to be taken as correct, and production is not to be required.(*c*)

Sect. 3 only applies to sales made after the commencement of the Act, and only so far as there is no stipulation to the contrary in the contract of sale.(*d*)

The abstract having been compared with the title deeds, &c., the solicitor for the vendor will, within the time appointed for that purpose, receive from the purchaser's solicitor requisitions on the title which the vendor's solicitor must answer. If the title is a complicated one, it may be advisable to lay the requisitions, with a copy of the conditions of sale and the abstract, before counsel for him to advise thereon. In answering the requisitions, it is usual to write the answers opposite to each requisition in the space or column left for this purpose by the purchaser's solicitor in preparing the requisitions.

The requisitions having been disposed of, the vendor's solicitor will receive from the purchaser's solicitor the draft conveyance for perusal and approval. In perusing the draft conveyance the vendor's solicitor must ascertain that the

(*a*) Wolstenholme and Turner's Conv. Acts, 15, n. (o).
(*b*) 37 & 38 Vict. c. 78, s. 2.
(*c*) 44 & 45 Vict. c. 41, s. 3, sub-s. 3.
(*d*) 44 & 45 Vict. c. 41, s. 3, sub-ss. 9, 10.

recitals therein are correct, and that the vendor is not made to enter into covenants, either by express stipulation, or by implication under the 44 & 45 Vict. c. 41, s. 7, which he cannot be called upon to give.

Formerly, a vendor beneficially interested in the purchase-money, could only be required to give qualified covenants extending to his own acts, which were, that he had good right to convey, for quiet enjoyment, free from incumbrance created by himself or any person claiming under him, and for further assurance at the cost of the purchaser. Where, however, the vendor took the estate by descent, or derived his title through a will, his covenants were extended so as to include the acts of his ancestor or testator. By these covenants the heirs of the vendor were always expressly bound.(*a*)

Trustees who have no beneficial interest in the property merely covenant that they have respectively done no act to incumber the premises.(*b*)

Under the 44 & 45 Vict. c. 41, s. 7, covenants for title are not required, for on stating in the deed the character in which a person conveys, the proper covenant by him is incorporated. And by sections 58 and 59, the heirs, &c., are included though not mentioned. However, we shall speak more fully of covenants hereafter.

The draft conveyance having been approved by the vendor's solicitor, he makes a fair copy thereof for his own use, and returns the original draft to the solicitor for the purchaser, who has it engrossed, and then sends the draft and engrossment to the vendor's solicitor for examination. The purchaser's solicitor next obtains an appointment to complete, which takes place at the office of the vendor's solicitor, unless the property be mortgaged, in which case the completion must be at the office of the mortgagee's solicitor.

(*a*) Will. Real Pro. 447, 448, 13th ed.
(*b*) Will. Real Pro. 449, 13th ed.

If any interest is to be paid in addition to the purchase-money, the amount must be calculated, and on payment of this and the remainder of the purchase-money, the vendor executes the conveyance, and the deeds are handed over to the purchaser. The points of practice involved on the completion of a purchase will, however, be found more fully detailed under the head "purchases."

The foregoing directions will we hope be sufficient to meet the practice on a sale so far as regards the vendor's solicitor in the majority of cases, whether the sale be by public auction or by private contract, for in the latter case the agreement of sale and purchase fills the place of the conditions of sale, and requires the same care and accuracy in its preparation. In some cases, however, a client will inform his solicitor that he has already entered into a contract for the sale of his estate without any stipulations as to the title. This is called an "open contract," which will be found treated of in the following chapter.

CHAPTER III.

PURCHASES.

A SOLICITOR may be consulted by a client either before or after a purchase of real estate has been made. A client will perhaps state that he has already bought a property at a public auction, and hand the particulars and conditions of sale and contract of purchase to the solicitor, to act for him in the completion of the purchase.

The first duty of the solicitor in this event is to peruse the particulars and conditions of sale on his client's behalf, and if there is a right to avoid the purchase on the ground of fraudulent representations by the seller, the right ought at once to be exercised by the purchaser, and not go on dealing with the property as the owner of it, for such conduct may amount to a waiver of his right to rescind the contract.(*a*)

With the exception of the vendor, or his agent, suppressing an incumbrance, or a defect in the title, it seems clear that a purchaser cannot obtain relief against the vendor for any incumbrance or defect of title to which his covenants do not extend.(*b*) It is the duty, therefore, of the purchaser's solicitor to investigate the title to the property bought on his client's behalf, for if this be not done, or any defect be overlooked, the purchaser has no remedy against the vendor beyond what the vendor's covenants may afford. But if a purchaser is damnified by the gross want of skill of his solicitor, or by his neglect to search for incumbrances, he may recover in an action against the solicitor for any loss he

(*a*) Lord St. Leonards' Handy Book, 25.
(*b*) Lord St. Leonards' Handy Book, 25; 1 Dart's V. & P. 93-96, 5th ed.

may sustain. If, however, the solicitor has acted under the advice of counsel he is safe.(*a*)

Although a vendor is bound to inform the purchaser of *latent* defects in the property, a purchaser is not bound to inform the vendor of any *latent* advantage therein. If the purchaser, therefore, knew of a mine on the estate of which he was in treaty, he would not be bound to disclose that circumstance to the vendor, although the purchaser was aware that the vendor was ignorant of it. But the purchaser cannot justify misrepresenting the estate to any person desirous of purchasing it, or concealing the death of a person of which the vendor is ignorant by which the estate is increased in value.(*b*)

This is a convenient place to speak of the doctrine of notice, both before and since the Conveyancing Act, 1882. Notice may be either actual or constructive—that is, imputed by construction of law. Actual notice, to constitute a binding notice, at least when it depends on oral communication, must, it is said, be given by a person interested in the property, and in the course of the treaty.(*c*)

The means of knowledge by which anyone is to be affected with notice, must be understood means of knowledge which are practically within reach, and of which a prudent man might have been expected to avail himself.(*d*)

As to constructive notice, the modern doctrine seems to be that it consists in those circumstances under which the court concludes, either that a party, personally or through his agent, has fraudulently abstained from acquiring actual notice, or has been guilty of such negligence in not availing himself of the means of acquiring it, as, if permitted, might

(*a*) Lord St. Leonards' Handy Book, 25, 26; 1 Dart's V. & P. 454, 543, 5th ed.

(*b*) Lord St. Leonards' Handy Book, 27; 1 Dart's V. & P. 106, 107, 5th ed.

(*c*) 2 Spence's Eq. 753, 754; *Le Neve* v. *Le Neve*, 2 L. C. Eq., 23, 2nd ed.

(*d*) *Broadbent* v. *Barlow*, 30 L. J. Ch. 569; 4 L. T., N. S. 193.

be a cloak to fraud, and which, therefore, ought in its consequences, to be treated as equivalent to actual notice.(*a*)

Consequently, if a purchaser has notice of a deed forming part of the chain of title of the vendor or lessor, he is deemed to have constructive notice of the contents of such deed.(*b*)

And notice to the counsel, solicitor, or agent is notice to the client or principal, if such notice was acquired in the same transaction, or in one closely followed by and connected with the other, under circumstances that satisfy the court that the notice must have been remembered. For it would be a breach of duty or confidence in the counsel, solicitor, or agent not to inform the client or principal.(*c*)

But, notice to the solicitor is not notice to the client, when the person giving the information knows, or has good reason to believe, that it will not be communicated to the client.(*d*) Nor is a client to be affected with notice of a prior *fraud* committed by his solicitor, which the latter would, of course, conceal.(*e*)

However, as before shown, a person must not wilfully shut his eyes in order to avoid having notice, which he knew he would have if he made inquiry.(*f*)

Such is a brief summary of the doctrine of notice as it stands prior to the operation of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39).

This Act enacts, however, that a purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless (i.) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had

(*a*) 2 Dart's V. & P. 861, 5th ed; *Ogilvie* v. *Jeafferson*, 2 Gift. 353; 2 L. T. N. S. 778; *Kettlewell* v. *Watson*, 46 L. T., N. S. 83.
(*b*) *Patman* v. *Harland*, 17 Ch. Div. 353; 50 L. J. Ch. 642.
(*c*) 2 Dart's V. & P. 878, 5th ed.; Story's Eq. ss. 399, 408: *Thompon* v. *Cartwright*, 33 Beav. 178.
(*d*) *Sharp* v. *Foy*, 4 Ch. App. 35, 41; 17 W. R. 65.
(*e*) *Kennedy* v. *Green*, 3 Myl. & K. 699.
(*f*) *Kettlewell* v. *Watson*, 46 L. T. N. S. 83; L. R. 21 Ch. Div. 685.

been made, as ought reasonably to have been made by him; or (ii.) in the same transaction, with respect to which a question of notice to him arises, it has come to the knowledge of his counsel, solicitor, or agent as such, or would have come to their knowledge if they had made such inquiries and inspections, as they ought reasonably to have made: (sect. 3, sub-sect. 1).

This section is not, however, to exempt a purchaser from liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately, which may be enforced as heretofore: (sub-sect. 2). But he is not to be affected by notice in any case where he would not have been so affected if this section had not been enacted: (sub-sect. 3).

The changes effected by this Act seem to be these: Under sub-sect. 1 (i.), the question will be, what would have come to a purchaser's knowledge if such inquiries and inspections had been made, as ought reasonably to have been made by him?

The same sub-section (ii.), it will be observed, confines the notice obtained through the purchaser's counsel, solicitor, or agent to the same transaction with respect to which the notice to the purchaser arises. Therefore, so much of the former law, as extended the doctrine of constructive notice, so as to impute it when the transactions were closely connected one with another, can no longer be regarded as in force.

Sub-sects. 2 and 3 preserve the former law on this subject.

From the foregoing remarks upon the doctrine of notice, it follows that, when the conditions of sale state that the property offered is leasehold for years, it is absolutely necessary to ascertain the contents of the lease, particularly the covenants on the tenant's part to be observed and performed; for, if they should turn out to be onerous, the purchaser

would still be bound by his contract, notice of the lease being notice of its contents.(*a*)

Until it is clear that a good title can be made to the property, the solicitor, acting on behalf of a purchaser, should not allow his client to take possession, as such a measure would, in some cases, be deemed an acceptance of the title. If, however, the objections to the title can be remedied, and the purchaser should be desirous to take possession of the property, he may, in most cases, be permitted to do so, provided the vendor will sign a memorandum stating that the fact of the purchaser's taking possession shall not be deemed a waiver of the objections to the title.(*b*)

If a solicitor accompanies his client to an auction room, he must bear in mind that a bidding may be retracted at any time before the lot is actually knocked down, because the assent of both parties is necessary to make the contract binding. This is signified on the part of the vendor by knocking down the hammer.(*c*)

Also that the printed particulars and conditions of sale cannot, as a general rule, be altered or contradicted by parol at the sale.(*d*)

When the sale is concluded the purchaser is required to sign a short memorandum or agreement placed at the foot of the conditions acknowledging himself to be the purchaser of a particular property, or lot or lots. Usually the auctioneer, as agent for the vendor, does not offer to sign a reciprocal agreement for the vendor, whereby the purchaser is bound, but not the vendor.(*e*)

(*a*) *Patman* v. *Harland*, 17 Ch. Div. 353; 50 L. J. Ch. 642; 29 W. R. 707; *Nicoll* v. *Fleming*, 19 Ch. Div. 258; 51 L. J. Ch. 166; 30 W R. 95.

(*b*) 1 Dart's V. & P. 433, 434, 5th ed.; Lord St. Leonards' Handy Book, 30.

(*c*) Lord St. Leonard's Handy Book, 32.

(*d*) Sug. Con. V. & P. 12, 113; 1 Dart's V. & P. 110, 5th ed.

(*e*) See Lord St. Leonards' Handy Book, 33; 29 Car. 2, c. 3, s. 4; *et ante*, p. 13.

A trustee cannot purchase of himself, and he is not allowed to become a purchaser of the trust property even at a sale by public auction. He may, however, purchase from his former *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a scrupulous and jealous examination of all the circumstances, and there is no fraud, no concealment, and no advantage taken by the trustee of information acquired by him in the character of trustee.(*a*)

The same restriction on the right of purchase applies to other persons standing in similar confidential situations, as to counsel, agents, assignees, and solicitors of a bankrupt's or insolvent's estate, auctioneers and creditors who have been consulted as to the sale. This is prohibited, in order to prevent the temptation of such persons availing themselves of information for their own benefit, and concealing it from those for whom they act.(*b*)

If two persons, not partners in trade, purchase lands and advance the money in equal portions and take a conveyance simply to themselves in fee, they will hold the estate as joint tenants, and the survivor will take the whole. It is otherwise, however, where the money is advanced in unequal proportions.(*c*)

Thirdly, a client may come to his solicitor, having entered into a contract for the purchase of an estate by private contract, which may be evidenced either by a formal agreement or by letters which have passed between the vendor and purchaser. So the parties may bind themselves in other ways; for although the 4th section of the Statute of Frauds (29 Car. 2, c. 3) requires contracts relating to lands, tenements, or hereditaments to be in writing, signed by the party to be charged or his agent, yet, as we have already shown, if the defendant admits the agreement and does not set

(*a*) *Fox* v. *Mackreth*, 1 L. C. Eq. 123, 166, 5th ed.; Story's Eq. ss. 321, 322.

(*b*) Story's Eq. s. 322; Lord St. Leonards' Handy Book, 36.

(*c*) Story's Eq. s. 1206; *Lake* v. *Gibson*, 1 L. C. Eq. 143, *et seq.*, 2nd ed.

up the statute as a bar; or if he prevented the contract from being reduced into writing by fraud; or if the agreement has been partly performed; any one of these takes the case out of the statute.(*a*)

Not only may letters which have passed between the parties amount to an agreement, but a receipt for the purchase money, if it contain all the terms, will be a sufficient agreement to satisfy the Statute of Frauds, which only requires the contract to be signed by the *party to be charged*, therefore the party signing is bound, whereas the other party, if acting *bonâ fide*, is not.(*b*)

Mere inadequacy of price or consideration for the estate purchased does not, in the absence of fraud, form a ground for avoiding a contract.(*c*) And a modern statute enacts that no purchase, made *bonâ fide* and without fraud or unfair dealing, of any reversionary interest, is to be set aside merely on the ground of inadequacy of price.(*d*)

If an agreement has been entered into by the parties without the intervention of a solicitor it would no doubt amount to an open contract, under which the purchaser can require a good forty years' title to be shown as regulated by the 37 & 38 Vict. c. 78, and the 44 & 45 Vict. c. 41, in part already considered in previous pages.

In perusing the agreement or correspondence it must be considered whether it amounts to a valid contract of sale and purchase. If it amounts merely to a treaty it will not sustain an action. Letters, like an agreement, must contain all the terms. The property must be described, the price must be fixed, &c. There must be a clear offer on the one side, and a simple acceptance on the other, without introducing any new

(*a*) *Lester* v. *Foxcroft*, 1 L. C. Eq. 625, 2nd edit.; Story's Eq. s. 755, *et seq.*

(*b*) Lord St. Leonards' Hand Book, 41; *Shardlaw* v. *Cotterill*, L. R, 20, Ch. Div. 90.

(*c*) *Longmate* v. *Ledger*, 2 L. T. N. S. 256; *Baker* v. *Monk*, 10 *ib*, 86; Story's Eq. s. 244.

(*d*) 31 Vict. c. 4.

stipulation or any exception.(*a*) It must be remembered that an offer to sell may be recalled at any time before it is accepted, and an offer to purchase may in like manner be recalled or modified. If the answer is sent by letter by post it is binding on the writer, although the other party do not receive it till the day following.(*b*)

Having considered the various ways in which a solicitor is usually concerned for a purchaser, we will now presume that a binding contract has been entered into for the sale and purchase of an estate. And we may here observe that the estate belongs to the purchaser from the date of such contract, and he is entitled to any benefit which may accrue before the conveyance is executed. On the other hand, he must bear any loss that may happen to it. Therefore, if a house is burned down the purchaser must pay the vendor and suffer the loss, although the vendor permits the assurance to expire without giving him notice, or has even received the amount the property was insured for from the insurance office.(*c*) Upon entering into an agreement for buying house the purchaser should, therefore, provide for the insurance of it. Again, if a person buys an estate held for lives, and the lives drop the next day, he must nevertheless pay the price.(*d*)

A condition that a purchaser shall pay for the timber on the estate will include trees considered as timber according to the custom of the country, although not strictly timber.(*e*)

As to fixtures, where nothing is said about them, common fixtures will pass to the purchaser under a common conveyance, without any additional price being paid for them,

(*a*) *Kennedy* v. *Lee*, 3 Mer. 441; *Marshall* v. *Berridge*, 45 L. T., N. S. 595; Lord St. Leonards' Handy Book, 40.

(*b*) Lord St. Leonards' Handy Book, 41.

(*c*) *Rayner* v. *Preston*, L. R. 18 Ch. Div. 1; *Castelain* v. *Preston*, L. R. 8 Q. B. 613.

(*d*) Lord St. Leonards' Handy Book, 46.

(*e*) Lord St. Leonards' Handy Book, 47; 1 Dart's V. & P. 133, 5th ed.

unless an intention could be collected from the conveyance or contract that the fixtures should not pass.(*a*)

An intending purchaser should see that there are no nuisances on the property; for if one exists, although the property be in lease, and the nuisance cannot be removed by a purchaser of the property, he would nevertheless render himself liable for it. But if the nuisance were created by the occupier after the purchase, the purchaser would not be responsible, still the purchaser should not let the property with the nuisance upon it.(*b*)

As to drains, where the owner of two or more adjoining houses, sells or conveys one of the houses, the purchaser of such house will be entitled to the benefit of all the drains from his house, and will be subject to all the drains necessary to be used for the enjoyment of the adjoining houses, although there is no express reservation as to drains, for the purchaser bought the house such as it was.(*c*)

As to mines, if the surface of land be granted reserving the mines, with power to work them, the grantee will have a *primâ facie* right to the support of the subjacent strata. So if the minerals are let or granted, and the surface retained, the grantor's right to support will in like manner remain.(*d*)

As to water, an owner of land may sink a well on his land and divert by pumps and steam engines the underground water which would otherwise percolate the soil, and flow into the river, although there is on the banks of the river a mill which has been worked by the river for more than sixty years (*e*). Still a land owner cannot use his right to water percolating underground strata, so as to draw off

(*a*) Lord St. Leonards' Handy Book, 48; 1 Dart's V. & P. 132, 5th ed.

(*b*) Lord St. Leonards' Handy Book, 48; 2 Dart's V. & P. 920, 5th ed.

(*c*) Lord St. Leonards' Handy Book, 48, 49.

(*d*) See Collier on Mines, 60, *et seq.*, 2nd ed.; Lord St. Leonards' Handy Book, 50.

(*e*) Lord St. Leonard's Handy Book, 51; *Chasemore* v. *Richards*, 7 H. L. Ca. 349.

the water flowing in a defined surface channel on his neighbour's land.(*a*)

The abstract of title having been received from the vendor's solicitor, the time limited by the condition of sale for sending in requisitions on the title must be carefully borne in mind; and to this end a memorandum of the date of the receipt of the abstract of title should be made. This done, the purchaser's solicitor obtains from the vendor's solicitor an appointment to compare the abstract with the title deeds at one of the three places named *ante*, p. 20. The appointment made, the purchaser's solicitor attends at the place mentioned accompanied by his clerk, who should slowly read the abstract while the solicitor carefully reads the deeds, &c., themselves; and, in doing this, the solicitor should read through the *whole* contents of the various documents abstracted in order to ascertain if every clause in each document is abstracted, otherwise it may happen that some important clause in a particular instrument has, either from carelessness or design, been omitted from the abstract. It will still be necessary, in case the title is carried back for forty years, to see that deeds conveying realty between 15th May, 1841, and 1st Oct., 1845, are expressed to be made in pursuance of the 4 & 5 Vict. c. 21, "An Act for rendering a release as effectual for the conveyance of freehold estates as a lease and re-lease by the same parties." It must also be seen that these deeds bear the same amount of stamp duty (except progressive duty) as the lease and release, for which they were substituted, bore.(*b*) If the amount of stamp duties has not already been noted in the margin of the abstract, the purchaser's solicitor should do this when comparing the deeds, &c., with the abstract; but as it is not the practice to count the number of folios in the various documents to see whether they are charged with the proper amount of progressive duties, it does not appear to be of any

(*a*) *Grand Junction Canal Company* v. *Shuger*, L. R. 6 Ch. App. 483. (*b*) Sect. 1, and 8 & 9 Vict. c. 106, s. 1.

advantage to note the number of followers.(*a*) It must, however, be ascertained that the amount of *ad valorem* duty is correctly impressed.

It must also be seen that each document is properly executed and attested, and that the receipt for the consideration money (if any) is duly indorsed, signed, and witnessed. But as to deeds executed after the 31st Dec., 1881, if there is a receipt for the consideration money in the body of the deed, it is sufficient without the receipt being also indorsed on the deed (*b*); and a receipt in the body of the deed, or indorsed thereon, is sufficient evidence of payment of the consideration money, in favour of a subsequent purchaser without notice that such money was not in fact paid. (*c*)

If a deed has been executed under a power, it must be seen that the terms of the power have been complied with; at least so far as the 22 & 23 Vict. c. 35, s. 12, does not render a strict compliance with the terms of the power necessary. This statute provides that a deed thereafter executed in the presence of, and attested by two or more witnesses shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed, or document not testamentary, notwithstanding it was expressly required that some additional or other form of execution or attestation should be observed. But if the deed creating the power requires any act to be done, not having reference to the mode of execution and attestation, as the consent of any person, this must still be complied with. (*d*)

So a will executed under a power must be executed and attested conformably to the 1 Vict. c. 26, s. 10.

If a deed has been executed by a married woman not in respect of an estate settled to her separate use (*e*); and not in respect of her separate property (*f*); or of property which

(*a*) Hughes' Pract. Conv. 156, 157. (*b*) 44 & 45 Vict. c. 41, s. 54.
(*c*) 44 & 45 Vict. c. 41, s. 55. (*d*) See 22 & 23 Vict. c. 35, s. 12.
(*e*) 3 & 4 Will. 4, c. 74, s. 24; *Kerr* v. *Brown*, 33 L. T. 179; *Taylor* v. *Meads*, 13 W. R. 394; 12 L. T., N. S. 6; *et ante*, p. 3.
(*f*) 45 & 46 Vict. c. 75, ss. 1, 2, 5; c. 38, s. 61; *et ante*, p. 3.

she takes as if she were a *feme sole*;(*a*) or of property vested in her as a bare trustee (*b*); it must be seen that such deed, if dated prior to the 1st January, 1883, is indorsed with a memorandum of acknowledgement by her before *two* commissioners, or a judge of the High Court, or of a County Court; and the office copy of the certificate of acknowledgement must be called for. (*c*) But since the above date it is sufficient if the deed is acknowledged before one commissioner or a judge; and where the memorandum of acknowledgement purports to be signed by a person authorised to take the acknowledgement, the deed, as regards the execution by the married woman, takes effect at the time of acknowledgement, and is to be conclusively taken to have been duly acknowledged. No verified certificate being now necessary. (*d*) But we shall speak of the acknowledgement of deeds by married women more fully in subsequent pages of this chapter.

If any document requires enrolment to give it validity, as a bargain and sale of freeholds (*e*); or a disentailing assurance (*f*); or a conveyance under the Statute of Mortmain (*g*), it must be seen, not only that such enrolment has been perfected, but that it was done within the time specified by the particular statute requiring such enrolment.

If the estate purchased lies in one of the register counties, which are Middlesex, York, and Kingston-upon-Hull, it must be seen that the deed is duly indorsed with the usual memorandum of registration. (*h*)

The deeds, &c., having been compared with the abstract,

(*a*) 20 & 21 Vict. c. 85, ss. 21, 25; 41 Vict. c. 19, s. 4.
(*b*) 37 & 38 Vict. c. 78, s. 6; and see *ante*, p. 4.
(*c*) 3 & 4 Will. 4, c. 74, ss. 79-88; 20 & 21 Vict. c. 57.
(*d*) 45 & 46 Vict. c. 39, s. 7; Conv. Rules, December, 1882, rr. 1-6.
(*e*) See 27 Hen. 8, c. 16.
(*f*) 3 & 4 Will. 4, c. 74, s. 41.
(*g*) 9 Geo. 2, c. 36.
(*h*) By the 37 & 38 Vict. c. 78, s. 8, where a will devising land in Middlesex or Yorkshire has not been registered within the proper time, a conveyance of the land to a purchaser or mortgagee, by the devisee if registered before, will take precedence of a conveyance from the testator's heir-at-law.

the next step is the perusal of the abstract. If the solicitor doubts his own ability to do this he must lay the abstract before counsel with instructions to peruse it on behalf of the purchaser. A copy of the particulars and conditions of sale must accompany the abstract. Should, however, the solicitor proceed to peruse the abstract he will keep in special view the following points:—(1) the origin of the title; (2) that the abstract shows proper conveying parties of both the legal and equitable estate; (3) that the parcels, that is the property, is properly identified as being the same as those comprised in the documents forming the rest of the title; (4) that there are no incumbrances on the property, or only such as can be discharged, as a mortgage; (5) that the documents of title are really what they purport to be.

It will be of considerable service to a solicitor in perusing an abstract of title to make an analysis of it as he proceeds; and for this purpose it is better to have a regular book divided into half columns or margins instead of slips of paper. This may be done briefly, thus:

TITLE OF A. B. TO TWO FREEHOLD HOUSES, 19 AND 20, HALF MOON STREET, PICCADILLY.

1 Jan. 1843.—Conveyance from X. Y. to A. B. in fee, of two houses in Half Moon Street, Piccadilly.	Identify the parcels. Are the houses let to tenants? if so, inspect leases.

And so proceed with each document set out in the abstract.

In perusing the abstract and framing requisitions on the title, the solicitor must be guided by the fact whether there are conditions or a contract of sale, or whether the agreement is an open one. In the former case the requisitions on the title must be confined within the limits allowed by express stipulation, and in the latter case the requisitions must be framed so as not to exceed the rights of a purchaser as defined by the Vendor and Purchaser Act, 1874, and the Conveyancing Acts, 1881, 1882, which have already been partly considered in previous pages.

Under an open contract the purchaser can require that the abstract shall commence with some document at least forty years old, the 37 & 38 Vict. c. 78, s. 1, enacting that, on a contract of sale of land, subject to any stipulation to the contrary, forty years is to be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the period formerly required, except in cases where an earlier title than sixty years might previously be required. (*a*)

And by sects. 1 and 2, rule 2, of this Act, on a contract for the sale of land, recitals, statements of facts, and parties, in deeds and documents twenty years old at the date of the contract, are, unless proved to be inaccurate, to be taken as sufficient evidence of the truth of such facts, &c., in the absence of stipulation to the contrary. (*b*)

And by the 44 & 45 Vict. c. 41, s. 3, sub-s. 3, on a sale of *any property* after the operation of the Act, a purchaser cannot require the production of any abstract, or copy, of any deed or document made before the time prescribed by law (forty years), or stipulated, for the commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted; nor can he make any requisition, objection, or inquiry with respect to such deed or document, or the title prior to that time, although such deed or document, or prior title, is recited, covenanted to be produced, or noticed. And he is to assume, unless the contrary appears, that the recitals contained in the abstracted instruments of any deed or document forming part of that prior title are correct and give the material contents of such deed or document, and that each recited deed or document was duly executed and perfected.

We have also seen (*ante*, p. 14) that, under an open contract to sell leaseholds for years, the purchaser cannot call for the lessor's title. It will be sufficient therefore to commence

(*a*) As in the case of an advowson, where the title is carried back one hundred years: (3 & 4 Will. 4, c. 27, ss. 30, 33.)

(*b*) See *Bolton* v. *London School Board*, L. R. 7 Ch. Div. 766, as to the construction of this section.

the abstract of title with the lease or underlease. The purchaser is to assume, unless the contrary appears, that the lease or underlease was duly granted, the last receipt for rent being evidence of performance of covenants therein. (*a*)

We have also shown (*ante*, p. 20) that the expenses of evidence required in support of the abstract, not in the vendor's possession are thrown on the purchaser.

The 37 & 38 Vict. c. 78, s. 2, r. 3, also enacts that the inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title is not to be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to production of such documents. By rule 4 such covenants for production as a purchaser can and shall require are to be at his cost, and the vendor is to bear the expense of perusal and execution on behalf of himself and all necessary parties other than the purchaser. Rule 5 provides that where the vendor retains any part of the estate to which any documents of title relate, he is to be entitled to retain such documents. And since the operation of the 44 & 45 Vict. c. 41, s. 9, a covenant for production of deeds is no longer necessary. A mere written acknowledgment, as defined by the Act, gives the proper title to production and delivery of copies. And an undertaking gives the proper remedy in case of destruction or damage. This section will, however, be more fully considered in subsequent pages.

Having briefly defined the rights of a purchaser under an open contract, we will now state what evidence is usually called for to prove or verify the abstract, in addition or supplemental to the deeds and documents themselves.

If there is any doubt as to the identity of the parcels, land tax, and poor rate assessments are usually received as evidence of identity.

Births, deaths, and marriages are proved by certificates

(*a*) 37 & 38 Vict. c. 78, s. 1; 44 & 45 Vict. c. 41, s. 3, sub-ss. 1, 4, 5; 45 & 46 Vict. c. 39, s. 4.

thereof, either from the parochial registry or from the general registry kept at Somerset House, or by a recital or statement contained in some deed, &c., dated twenty years before the date of the contract of sale. (*a*)

Where the property has passed by devise, probate of the testator's will, or an office copy thereof, should be called for. And proof should, if necessary, be given that the deceased did not leave a widow entitled to dower or freebench.

In case of intestacy, the marriage of the intestate, the birth of the heir-at-law, and the death of the intestate must all be proved by recitals in deeds, &c., twenty years old (*b*), or by the certificates of the respective events in their order. These may be supplemented by a statutory declaration from some old person well acquainted with the intestate and his family, extracts from family bibles, tombstones, &c.

If a deed has been executed under a power of attorney, created by an instrument executed before 1st January 1883, the production of the power should be called for, as also proof that the principal was alive at the time the power was exercised; as a power of this nature expires by the death of the principal.(*c*) On this point the 44 & 45 Vict. c. 41, s. 47, enacts that, after the operation of the Act, any person making any payment, or doing any act in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act because, before such payment or act, the donor of the power had died, or become lunatic, or bankrupt, or had revoked the power, if the fact of death, &c., was not at the time of the payment or act known to the person making or doing the same. The right and remedy of the person interested in the money paid against the payee is, however, reserved.

This section is supplementary to sect. 26 of 22 & 23 Vict. c. 35, which only applied to trustees, executors, and administrators. It seems to enable the attorney to give a valid discharge for the purchase-money, so that where the contract

(*a*) See 37 & 38 Vict. c. 78, s. 2, r. 2. (*b*) *Ibid.*
(*c*) Sug. Conc. V. & P. 420, 421.

is binding on the vendor the purchaser would obtain a good equitable title in case of the death of the vendor. The legal estate would remain outstanding, but a conveyance could be obtained from the personal representatives under sect. 4 of the 44 & 45 Vict. c. 41, which has already been considered, *ante*, p. 16. Notwithstanding, therefore, sect. 47 of this Act, it was considered advisable to continue the former practice of depositing or retaining the purchase money, until it was ascertained that the vendor survived the date of the execution of the deed by his attorney.(*a*)

The 45 & 46 Vict. c. 39, s. 8, however, provides that a power of attorney given for valuable consideration, created by an instrument executed after the 31st December 1882, which is in such instrument expressed to be irrevocable, then in favour of a purchaser (*b*), (i.) the power is not to be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee thereof, or by the death, marriage, lunacy, or bankruptcy of such donor.

And (ii.) any act done at any time by the donee of the power in pursuance of the power, is to be as valid as if anything done by the donor thereof without the concurrence of the donee had not been done, or the death, marriage, lunacy, or bankruptcy of the donor had not happened.

And (iii.) neither the donee of the power nor the purchaser is, at any time, to be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee thereof, or of the death, marriage, &c., of the donor.

By sect. 9, if a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power (executed after the above date) expressed to be

(*a*) See Wolstenholme and Turner's Conv. Acts, 74, 75, n.

(*b*) Purchaser includes a lessee or mortgagee, or an intending purchaser, lessee, or mortgagee, or other person, who for valuable consideration takes or deals for property: (44 & 45 Vict. c. 39, s. 1, sub-s. 4 (ii.).

irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then in favour of a purchaser (i.), the power is not to be revoked during the fixed time, either by anything done by the donor of the power without the concurrence of the donee thereof, or by the death, marriage, lunacy, or bankruptcy of such donor.

And (ii.) any act done within the fixed time by the donee of the power, in pursuance of the power, is to be as valid as if anything done by the donor thereof without the concurrence of the donee had not been done, or the death, marriage, lunacy, or bankruptcy of the donor had not happened.

And (iii.) neither the donee of the power nor the purchaser is, at any time, to be be prejudicially affected by notice, either during or after the fixed time, of anything done by the donor of the power during that fixed time, without the concurrence of the donee thereof, or of the death, marriage, &c., of the donor within the fixed time.

It will be noticed that both classes of powers spoken of in these two sections must be expressed to be irrevocable by the instrument creating them. Then in favour of a purchaser for value, sect. 8 renders the power irrevocable at any time by any act of the donor alone, or by his death, &c.; and sect 9 makes the power, whether given for value or not, in like manner irrevocable for the period fixed, which, however, must not exceed one year from the date of the instrument. So that now, whether a purchaser should call for proof that the vendor outlived the execution of the deed by his attorney will depend upon the circumstances detailed in preceding pages.

If any deed relating to the title to the property be lost or destroyed, proof of its loss or destruction and due execution must be called for. This must, however, be read in connection with the 44 & 45 Vict. c. 41, s. 3, sub-s. 6, set out, *ante*, p. 20.

If land has devolved upon any person by the death of

another since 19th May 1853, the purchaser should call for a receipt and certificate of payment of succession duty.(*a*)

The perusal, &c., of the abstract having been completed, the solicitor proceeds to draw his requisitions on the title from the analysis made by him in the mode pointed out *ante*, p. 36. Should the abstract have been laid before counsel for his opinion thereon, the requisitions are drawn from his opinion. A fair copy of the requisitions is next made on foolscap paper in half margin, the right-hand half being left clear for the answers to the requisitions. This fair copy is, of course, sent to the vendor's solicitor.

Having received the answers to the requisitions on the title, the purchaser's solicitor will carefully consider whether they are sufficient, and if he has any doubt on the point it will be advisable to lay them before counsel for his opinion thereon. If this is done, a copy of the abstract of title and of the contract or conditions of sale should accompany the requisitions.

By the 37 & 38 Vict. c. 78, s. 9, it is provided that a vendor or purchaser of real or leasehold estate in England may apply in a summary way to a judge of the Chancery Division of the High Court in chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being one affecting the validity of the contract), and the judge will make such order as may be just, and direct by whom and how the costs of and incident to the application are to be paid.

It is said to be the duty of the court in every case where a doubt arises to remove that doubt by deciding it, and to assume that what a competent tribunal decides is right.(*b*)

Frequent disputes arise as to the payment of interest on the purchase-money, as it is often lying dead. It has therefore become a practice with many solicitors to insert a condi-

(*a*) 16 & 17 Vict. c. 51, s. 52.

(*b*) 1 Prid. Conv. 85, 11th ed.; *Palmer* v. *Lock*, L. R. 18 Ch. Div. 381.

tion that if the purchase is not completed at the time appointed, from whatever cause, the purchaser shall pay interest at the rate of 5 per cent. per annum on the purchase-money.

The proper construction of such a condition appears to be that if the delays are occasioned by defects of title, but not by the wilful default or vexatious conduct on the part of the vendor, the purchaser must pay interest from the day fixed for completion, and not from the time when a good title was first shown, although he is not in fault.(*a*)

It would, therefore, be better to frame the condition to the effect of this construction.

The requisitions and objections having been satisfactorily answered, and the title approved of, the next step is the preparation of the purchase deed by the solicitor for the purchaser, or by counsel from his instructions. If counsel is instructed to draw the conveyance, the abstract of title, requisitions and answers, accompany the instructions.

The 44 & 45 Vict. c. 41, has made important alterations in the mode of framing purchase-deeds, which we will now consider.

The 8 & 9 Vict. c. 106, s. 2, enacts that all corporeal tenements and hereditaments shall, so far as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery. From this time it became the practice to use the word *grant* as the technical operative word in a conveyance of freehold land. The 44 & 45 Vict. c. 41, s. 49, however, declares that the use of the word grant is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal. In future, therefore, the word *convey* will probably be used as the operative word as to both freeholds and leaseholds.

Sect. 51 of this Act enacts that in a deed executed after the commencement of this Act, it shall be sufficient in the limitation of an estate in fee simple to use the words in fee

(*a*) *Des Visme* v. *Des Visme*, 1 M. & G. 336; *Sherwin* v. *Shakespeare*, 24 L. T. 45; *Williams* v. *Gleaton*, 13 L. T. N. S. 727.

simple, without the word heirs. And in the limitation of an estate in tail it is sufficient to use the words in tail, without the words heirs of the body; and in the limitation of an estate in tail male or in tail female, to use the words in tail male or in tail female, as the case requires, without the words heirs male of the body, or heirs female of the body.

Sect. 54, as already shown, provides that a receipt for the consideration money in the body of the deed is a sufficient discharge for the same to the person paying the same without a receipt thereof being indorsed on the deed, so far as regards deeds executed after this Act commences. And by sect. 55 a receipt for the consideration money in the body of the deed, or indorsed thereon, is sufficient evidence of payment in favour of a subsequent purchaser, without notice that the money thereby acknowledged to be received was not in fact paid. This section also only applies to deeds executed after the commencement of this Act.

The effect of these two sections is to make the receipt in the body of the deed sufficient evidence of payment. Before these enactments the receipt indorsed upon the deed was, in equity, considered the proper evidence of its payment.(*a*)

By sect. 6, sub-sects. 1, 4, 6, in future a conveyance of land will, unless a contrary intention is expressed in such conveyance, include and convey with the land all buildings, erections, fixtures, commons, fences, ditches, ways, waters, liberties, easements, privileges, advantages, and rights appertaining, or reputed to appertain, to the land or any part of it, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or appurtenant to the land, or any part thereof.

And by sub-sects. 2, 4, 6 of this section, a conveyance of land having houses, or other buildings thereon, will, in future, unless a contrary intention is expressed in such conveyance, include and convey with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, cisterns, sewers, drains, ways, passages, lights, watercourses,

(*a*) *Kennedy* v. *Green*, 3 M. & K. 699, 716; *Greensdale* v. *Dare*, 20 Beav. 284, 292.

liberties, privileges, easements, and rights appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with or reputed, or known, as part of or appurtenant to the land, houses, or other buildings conveyed, or any of them, or any part thereof.

The above section is not to be construed as giving to any person a better title to any property, right, or thing mentioned in it, than the title which the conveyance gives to him to the land expressed to be conveyed; or as conveying to him any property, right, or thing mentioned in this section; further or otherwise than as the same could have been conveyed to him by the conveying party.(*a*)

In future, therefore, there will be no necessity for general words following the description of the parcels.

The object of inserting general words in a conveyance was to prevent any question arising as to whether a particular easement or right would or would not pass without those words. In the large majority of cases the words may be useless, in a few isolated cases, some, or one, of them might be required.(*b*)

Rights of common or rights of way or passage over the property of another person are the principal kinds of incorporeal hereditaments usually found appurtenant to lands. When thus annexed to land they would, even before the above enactment, pass by a conveyance of the land without mention of the appurtenances. But if such rights, though usually enjoyed with the land, should not be strictly appurtenant to them, a conveyance of the land merely with its appurtenances, without mentioning the rights of common or way, would not be sufficient to comprise them. Hence the use of a general words clause.(*c*)

(*a*) 44 & 45 Vict. c. 41, s. 6, sub-s. 5.

(*b*) See Wolstenholme and Turner's Conv. Acts, 22; and see *Willis* v. *Watney*, 45 L. T., N. S. 739; *Cuthbert* v. *Robinson*, 46 L. T., N. S. 57.

(*c*) Will. Real Pro. 330, 331, 13th ed.

It will be noticed that mines and minerals are omitted from the general words which, by sub-ss. 1 and 2 of sect. 6, are made applicable to land and houses (*a*), for they pass under a conveyance of freehold land without being expressly mentioned, as do the houses above, the maxim being *cujus est solum, ejus est usque ad celum.* (*b*). But in copyhold or customary lands, mines and minerals belong to the lord of the manor, and do not therefore pass under an assurance of such lands by a copyholder. (*c*)

The 44 & 45 Vict. c. 41, s. 63, further provides that, after the 31st December, 1881, and so far as a contrary intention is not expressed in the conveyance, every conveyance shall be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.

This section merely confirms a previously existing rule of law, and applies the rule in the same cases, namely, where a contrary intention is not expressed. Even with an express all-estate clause a lease could not pass the fee for want of the word "heirs," also because the premises would be controlled by the habendum. The object of the Act is to do away with the "all-estate" clause. (*d*)

We now come to the covenants for title. Until the commencement of the 44 & 45 Vict. c. 41, it was the practice to insert in every conveyance of freeholds the covenants for title specified *ante*, p. 22. Since the commencement of this Act, however, covenants for title are no longer necessary, for on stating the character in which a person conveys the proper covenant by him is to be deemed to be included

(*a*) Sub-s. 3 of sect. 6 applies to manors, and mines and minerals are then included.

(*b*) Will. Real Pro. 14, 13th ed.

(*c*) Will. Real Pro. 355, 371, 13th ed.; Wolstenholme and Turner's Conv. Acts, 21, 22.

(*d*) Wolstenholme and Turner's Conv. Acts, 83.

and implied in the conveyance, so far as regards the subject matter or share of the subject matter expressed to be conveyed by him. (*a*)

In a conveyance for valuable consideration, other than a mortgage, the following covenant by a person who conveys and *is expressed* to convey as *beneficial owner* is implied (to the following effect): That notwithstanding anything by the person who so conveys, or anyone through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, he has, with the concurrence of all parties conveying by his direction (if any), power to convey the subject matter expressed to be conveyed, for quiet enjoyment thereof, free from incumbrances, and for further assurance. Purchase for value is not to include a conveyance in consideration of marriage. (*b*)

The expression "purchase for value" is not to include, it will be noticed, a conveyance in consideration of marriage. Therefore a person deriving title under a marriage settlement should, on selling, covenant as to the acts of his ancestor as he would if he were an heir-at-law. (*c*)

In a conveyance of leasehold property for valuable consideration, other than a mortgage, the following further covenant by a person who conveys and is expressed to convey as beneficial owner is implied (to the following effect): That notwithstanding anything by the person who so conveys, or anyone through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed, is a good, valid, and effectual lease, &c., and is in full force, unforfeited, unsurrendered, not void or voidable, and that the rents reserved by, and the covenants, &c., contained in, the lease or grant, on the lessee's or grantee's, &c., part, have been paid, observed,

(*a*) 44 & 45 Vict. c. 41, s. 7, sub-s. 1.

(*b*) See the covenant *in extenso*, set out in sect. 7, sub-s. 1 (A) to 44 & 45 Vict. c. 41.

(*c*) Wolstenholme and Turner's Conv. Acts, 25; *et ante*, p. 22.

and performed. Purchase for value is restricted as in the previous clause: (*see* 44 & 45 Vict. c. 41, s. 7, sub-s. 1, B.)

It will be observed that this section also speaks of "a person who conveys and is expressed to convey as beneficial owner." And see sub-s. 4.

The act does not imply a covenant of indemnity against the rent and covenants in the lease, on assignment of the lease.(*a*). If such a covenant is desired by a vendor, it must be inserted in the deed of assignment, and the deed must be executed by the purchaser.(*b*)

By sub-sect. 3 of sect. 7, it is also provided that where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then within this section, the wife is to be deemed to convey, and to be expressed to convey by direction of her husband as beneficial owner; and in addition to the covenant implied on the part of the wife, there is also to be implied (1) a covenant on the part of the husband as the person directing, and (2) a covenant on his part in the same terms as the covenant implied on the part of the wife.

This sub-section enables covenants on the part of the husband to be incorporated where husband and wife convey. If the husband consents but does not convey, the covenant is only implied on the wife's part. In practice, however, the wife conveys and the husband conveys and confirms. In such case both husband and wife should be expressed to convey as beneficial owners, and then the proper covenants on the part of each will be implied.(*c*)

The character in which the person conveys, as "beneficial owner" should be stated, or no covenant under sect. 7 will be implied (sub-s. 4).

And a demise by way of lease at a rent, or any customary assurance other than a deed, conferring the right to admittance

(*a*) As to the protection afforded to executors and administrators on an assignment of a lease of their deceased testator or intestate, see 22 & 23 Vict. c. 35, s. 27.

(*b*) See Wolstenholme and Turner's Conv. Acts, 26, n.

(*c*) See Wolstenholme and Turner's Conv. Acts, 30, n.

to copyhold or customary land, is excluded from sect. 7 (sub-sect. 5).

But the benefit of a covenant implied as aforesaid is annexed to and runs with the estate, and may be enforced by every person in whom the estate is, either for the whole or any part thereof, from time to time vested (sub-sect. 6).

This implied covenant may be varied or extended by deed, and will then, as far as may be, operate as if such variations or extensions were directed in sect. 7 to be implied. As before stated, sect. 7 only applies to conveyances made after the commencement of the Act (sub-sects. 7, 8).

By sect. 58 of the Act it is provided, that after the commencement of the Act, a covenant relating to land of inheritance, or devolving on the heir as special occupant, is to be deemed to be made with the covenantee, his heirs and assigns, and have effect as if heirs and assigns were expressed. And that a covenant relating to land not of inheritance, and not devolving on the heir as special occupant, is to be deemed to be made with the covenantee, his executors, administrators, and assigns, and have effect as if executors, &c., were expressed (sub-sects. 1, 2, 3).

And by sect. 59 a covenant and a contract under seal, and a bond or obligation under seal, made or implied after the Act, will, unless a contrary intention is therein expressed, operate in law to bind the heirs and real estate, as well as the executors and administrators, and personal estate, of the person making the same, though not expressed to bind heirs. This section extends to a covenant implied by virtue of this Act (sub-sects. 1-4).

Under the 11 Geo. 4 & 1 Will. 4, c. 47, s. 6, the heir was liable to be sued on his ancestors' covenants to the extent of the assets devolving upon him. All covenants, &c., will now bind the heir or devisee though not expressly mentioned. It must, however, be borne in mind that by the 32 & 33 Vict. c. 46, specialty debts rank no higher than simple contract debts in the administration of assets.(*a*)

(*a*) See also 38 & 39 Vict. c. 77, s. 10.

By sect. 60 of 44 & 45 Vict. c. 41, a covenant and a contract under seal, and a bond or obligation under seal, made with two or more jointly to pay money, make a conveyance, or do any other act, to them or for their benefit, is to be deemed to include and to imply an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, &c., devolves (sub-sect. 1).

This section applies only to covenants, &c., made or implied after the commencement of the Act, and only as far as a contrary intention is not expressed in the covenant, &c.; but it extends to a covenant implied by virtue of the Act (sub-sects. 2, 3, 4).

The effect of sects. 58 to 60 of the 44 & 45 Vict. c. 41, will be to shorten covenants and contracts under seal; and to reduce the form of a covenant made with several persons to that of a covenant with one person.(*a*)

By sect. 64 of this Act it is provided that in the construction of a covenant, or proviso, or other provision, implied in a deed by virtue of this Act, words importing the singular or plural number, or the masculine gender, are to be read as also importing the plural or singular number, or as extending to females, as the case may require.

We have briefly shown (*ante*, pp. 14, 38) the rights of vendor and purchaser where the former retains possession of the title deeds, and that an acknowledgment and an undertaking are substituted for the covenant for production.(*b*) We will now give the effect of the 44 & 45 Vict. c. 41, hereon more fully.

Sect. 9 enacts that when a person retains possession of documents and gives to another a written acknowledgment of his right to production and to delivery of copies thereof, such acknowledgment binds the documents to which it relates in the possession or under the control of the person retaining them, and of every other person having possession or control

(*a*) See Wolstenholme and Turner's Conv. Acts, 81, n.
(*b*) Wolstenholme and Turner's Conv. Acts, 35, n.

thereof from time to time; but binds each individual possessor or person as long only as he has possession or control thereof: and every such person must specifically perform the obligations imposed by such acknowledgment (unless prevented from so doing by fire or other inevitable accident); such performance to be at the written request of the person to whom the acknowledgment is given, or of any person, except a lessee at a rent, having or claiming any estate, interest, or right through or under that person, &c.

The obligations are: (1) An obligation to produce the documents or any of them at all reasonable times for the purpose of inspection, and of comparison with abstracts or copies thereof, by the person entitled to request production, or by anyone by him authorised in writing:

(2) An obligation to produce the documents, or any of them, at any trial, hearing, or examination in any court, or in the execution of any commission, or elsewhere in the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, &c.:

(3) An obligation to deliver to the person entitled to request the same copies or extracts, attested or unattested, of or from the documents or any of them (sub-sects. 1-4).

The costs and expenses of, or incidental to, the specific performance of any of the foregoing obligations are to be paid by the person requesting performance (sub-sect. 5).

An acknowledgment does not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising (sub-sect. 6).

A person claiming to be entitled to the benefit of an acknowledgment may apply to the Chancery Division of the High Court by summons at Chambers for an order directing the enforcement of such acknowledgment, which may be ordered accordingly (sub-sect. 7; sect. 69, sub-sects. 1, 3).

An acknowledgment is to satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents (sub-sect. 8).

This section removes any difficulty as to covenants for production running with the land, and it also removes the personal liability of the original covenantor after he has parted with the documents.

By sub-sect. 9 of sect. 9, where a person retains possession of documents and gives to another a written *undertaking* for safe custody thereof, such undertaking imposes on the person giving it, and on every person having possession or control of the documents from time to time, so long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncancelled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

It will be noticed that if an acknowledgment only is given all liability for loss or destruction is expressly excluded by sub-s. 6.

Any person claiming to be entitled to the benefit of such an undertaking may apply to the Chancery Division of the High Court by summons at Chambers to assess damages for any loss, destruction of, or injury to the documents, or any of them, and the court may, if it thinks fit, direct an inquiry as to the amount of damages, and order payment thereof by the person liable, and may make such order as it thinks fit, respecting the costs, &c. (sub-sect. 10; sect. 69, sub-sects. 1, 3).

An undertaking for safe custody of documents satisfies any liability to give a covenant for safe custody of documents (sub-sect. 11).

The provisions of sect. 9 apply only if and as far as a contrary intention is not expressed in the acknowledgment or undertaking; and only to an acknowledgment or undertaking given, or a liability respecting documents incurred, after the commencement of this Act (sub-sects. 13, 14).

On completion of a sale made after the commencement of this Act, the purchaser is not entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor as such; but he is entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may be his solicitor.(*a*)

(*a*) 44 & 45 Vict. c. 41, s. 8.

And by sect. 56, sub-sect. 1, where a solicitor produces a deed, having in the body thereof, or indorsed thereon, a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for the consideration, the deed is a sufficient authority to the person liable to pay or give the same for his paying or giving it to the solicitor, without such solicitor producing a separate authority for this purpose from the person who executed or signed the deed or receipt. The foregoing section only applies to cases where the consideration is to be paid or given after the commencement of this Act.(*a*)

This section meets the case of *Viney* v. *Chaplin* (*b*) where it was held that when the purchase-money was to be paid to the vendor's solicitor an express authority to pay him was required from the vendor. See also *ante*, p. 44, as to a receipt in the body of the deed or indorsed thereon being sufficient.

By sect. 46, the donee of a power of attorney may execute any instrument, &c., in and with his own name and signature, and his own seal, when sealing is required, by the authority of the donor of the power; and every instrument, &c., so executed and done is as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof. This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.(*c*)

Before this enactment a deed executed under a power of attorney was executed in the name of the donor of the power, adding the words "by *A. B.* his attorney." And it may still be necessary that a purchaser taking a conveyance executed under a power of attorney should ascertain that the donor of the power was alive at the time of execution of the conveyance, as fully stated *ante*, p. 39 *et seq.*

(*a*) 44 & 45 Vict. c. 41, s. 56, sub-s. 2.
(*b*) 2 De G. & J. 468, 482.
(*c*) 44 & 45 Vict. c. 41, s. 46.

Since the operation of the 44 & 45 Vict. c. 41, therefore, a purchase deed will consist of the following parts:

1. The date and parties.
2. The recitals (where necessary).
3. Testatum, stating the consideration, the character in which the person conveys, which raises the proper covenants by him by implication, and a description of the property conveyed.
4. The habendum.
5. The witnessing clause.

As before fully shown there need be no general words, no all estate clause, no particular technical operative word to pass the estate, no necessity to use the word "heirs" or "heirs of the body" to create an estate of inheritance, no covenants for title, and if there be a covenant, no mention of heirs, executors, administrators, or assigns of either covenantor or covenantee, obligor or obligee; no covenant for production of deeds, an acknowledgment and an undertaking being substituted; no multiplication of receipt clauses for the consideration money, a receipt in the body of the deed, or indorsed thereon, being sufficient.

Deeds may now be supplemental instead of being indorsed, and are to be read as if indorsed on the previous deed.(*a*)

The 4th schedule to the Act gives forms of deeds, and it is provided that deeds in the forms given in such schedule, or using expressions to the like effect, are as regards form and expression in relation to the provisions of the Act sufficient.(*b*) By sect. 66 of the Act protection is given to a solicitor adopting the Act and framing his drafts so as to incorporate the forms given by the Act (sub-sects. 1, 2). And where a solicitor is acting for trustees, executors, or other persons in a fiduciary position, those persons are protected in like manner (sub-sect. 3). And when such persons are acting without a solicitor they are protected in like manner (sub-sect. 4).

(*a*) 44 & 45 Vict. c. 41, s. 53.
(*b*) 44 & 45 Vict. c. 41, s. 57.

The draft conveyance having been prepared, a fair copy of it is made and forwarded to the solicitor for the vendor for his perusal and approval. If the vendor's solicitor makes any alterations in or additions to the draft, he usually does so in red or blue ink, and at the foot of the conveyance states that he approves of the draft conveyance, subject to such alterations. He then returns the draft to the solicitor for the purchaser, unless there are other solicitors engaged for other parties to the conveyance, in which case he sends it to them for their approval. The draft, however, ultimately being returned to the purchaser's solicitor. On receipt thereof he will carefully look through it to see whether the alterations, if any, are in any way objectionable or prejudicial to the interests of his client. If the purchaser's solicitor disapproves of the alterations or additions, he should return the draft to the vendor's solicitor, setting out his reasons for disapproval; but he should not strike them out, or otherwise alter the draft, as it is irregular to do so after it has been approved of by the vendor's solicitor.(*a*)

After the draft conveyance has been finally approved of, it must be engrossed by the solicitor for the purchaser; the draft and engrossment being afterwards sent to the solicitor for the vendor for examination. An appointment is then made for completion.

Before completing the purchase, however, the necessary searches for incumbrances must be made against the vendor, although the usual question has been asked in the requisitions, viz., whether there are any incumbrances not disclosed by the abstract of title, and the vendor's solicitor has answered in the negative. These searches should be made as near the completion of the purchase as possible. If the purchaser's solicitor discovers an incumbrance, he should at once inform the vendor's solicitor of the fact, and request its discharge. For a vendor is bound to discharge incumbrances before he has a right to call upon a purchaser to

(*a*) *Staines* v. *Morris*, 1 Ves. & B. 15.

accept a conveyance, and to pay the purchase-money, even if the purchase-money be thereby eaten up.(*a*) And by the 44 & 45 Vict. c. 41, s. 5, provision is made for the discharge of incumbrances, on a sale, by direction of the Chancery Division of the High Court.(*b*)

Provision is now made for searches to be made by the proper official of the central office of the Supreme Court.(*c*)

By the 45 & 46 Vict. c. 39, s. 2, and Rules of December, 1882, made thereon, where any person requires search to be made in the central office for entries of judgments, deeds (except as stated *post*), or other matters whereof entries are required or allowed to be made in that office under any statute, he may deliver in the office a written requisition, signed by him, referring to this section, and specifying his name and address and the name against which he desires search to be made, or in relation to which he desires an office copy certificate of the result of search, and other sufficient particulars; and he must also satisfy the proper officer that the same is required for the purposes of this section (subsects. 1, 4; rule 1). And for the latter purpose he must deliver to the officer a declaration, in the form given by the rules, stating for what purpose the search is required, and purporting to be signed by the person requiring such search, or by a solicitor, which declaration may be accepted by the officer as sufficient evidence that the search is required for the purposes of sect. 2 of 45 & 46 Vict. c. 39 (rule 2).

The proper officer is then to make the search required, and to make and file in the office a certificate of the result thereof; and office copies of the certificate may be obtained, and are evidence of the certificate.(*d*)

This certificate, whether in the affirmative or negative, is

(*a*) *Re Jackson and Oakshot*, L. R. 14 Ch. Div. 851.
(*b*) See hereon *Patching* v. *Bull*, 46 L. T., N. S. 227.
(*c*) See Rules of Court, April 1880, Ord. 60a, r. 8; 45 & 46 Vict. c. 39, s. 2.
(*d*) 45 & 46 Vict. c. 39, s. 2, sub-s. 2.

conclusive in favour of a purchaser, mortgagee, or lessee for value, as against persons interested under or in respect of judgments, deeds, or other matters or documents, whereof entries are required or allowed as aforesaid.(*a*)

Where a certificate setting forth the result of a search in any name has been issued, and it is desired that the search be continued in that name to a date not more than one calendar month subsequent to the date of the certificate, a written requisition may be left with the proper officer, who is to cause the search to be continued, and the result thereof is to be indorsed on the original certificate, and upon any office copy thereof which has been issued, if produced to the officer for that purpose.(*b*)

Copies of deeds and documents enrolled may be taken on payment of the prescribed fee.(*c*)

Sect. 2 of 45 & 46 Vict. c. 39, or any rule made thereunder, is not to take away, abridge, or prejudicially affect any right which any person may have independently of this section to make any search in the office, which may still be made as heretofore (sub-sect. 7).

No doubt, however, this section will be taken advantage of by solicitors, as sub-sect. 8 provides that where a solicitor obtains an office copy certificate of result of search under this section, he is not to be answerable in respect of any loss that may arise from error in the certificate. And by sub-sect. 9, where the solicitor is acting for trustees, executors, agents, or other persons in a fiduciary position, they also are not to be so answerable.

And where such persons obtain such an office copy without a solicitor, they are also to be protected in like manner (sub-sect. 10).

Nothing in this section applies to deeds enrolled under the Fines and Recoveries Act, or under any other Act, or under any statutory rule (sub-sect. 11).

(*a*) 45 & 46 Vict. c. 39, s. 2, sub-s. 3, and sect. 1, sub-s. 4 (ii.).
(*b*) Rule 4, of Rules made on sect. 2, 45 & 46 Vict. c. 39.
(*c*) Rule 5.

It will be remembered that a disentailing assurance, and the deed by which a protector consents thereto, if distinct from the disentailing assurance, must be enrolled (3 & 4 Will. 4, c. 74, ss. 41, 46); also a bargain and sale of freeholds (27 Hen. 8, c. 16); and conveyances under the Statute of Mortmain (9 Geo. 2, c. 36).

The searches usually made by a solicitor on the completion of a purchase are for judgments, *lis pendens*, and Crown debts, for a period of five years back, and for annuities; and if any judgment is found registered which was entered up after the 23rd July, 1860, also for registered writs of execution for a period of three calendar months back in the name of the creditor up to the 29th July, 1864, and after that time in the name of the debtor. These searches are made in the office of the registrar of judgments in the central office of the High Court.(*a*)

If the property bought lies in one of the register counties, which are Middlesex, York, and Kingston-upon-Hull, search must also be made in the local registry. If the property be of copyhold tenure, the court rolls of the manor in which the property is situate must be searched.(*b*)

If the circumstances warrant it, search should be made for bankruptcy and insolvency.(*c*)

It must be remembered that if lands lying in one of the register counties are placed on the register under the Land Transfer Act, the statutes relating to the local registry no longer apply.(*d*)

As to the execution of deeds, we have already (*ante*, pp. 34, 35, 52, 53) fully stated the provisions of the several statutes hereon. All deeds must be sealed and delivered; the act of sealing must precede that of delivery. Signing is not

(*a*) 1 & 2 Vict. c. 110; 18 Vict. c. 15; 22 & 23 Vict. c. 35, s. 22; 23 & 24 Vict. c. 38, ss. 1, 2; 27 & 28 Vict. c. 112; 28 & 29 Vict. c. 104; 42 & 43 Vict. c. 78.

(*b*) Sug. Conc. V. & P. 377, &c.

(*c*) *Cooper* v. *Stephenson*, 21 L. J. Q. B. 292.

(*d*) See 25 & 26 Vict. c. 53, s. 104; 38 & 39 Vict. c. 8.

required at common law to the due execution of a deed, but it is the usual practice. Reading over the deed is not essential to its due execution, unless this be required by any party thereto, and then if the deed be not read it is void as to him.(*a*)

It is usual to have the deed executed in the presence of at least one witness, who signs his name as attesting witness. The object of having a witness is, however, rather for the purpose of preserving the evidence than for constituting the essence of the deed itself.(*b*) If a deed is executed under a power, then two witnesses are sufficient, even though the deed creating the power requires more than two witnesses.(*c*)

Where a conveying party is a married woman, not in respect of property she can transfer as if she were unmarried, which is detailed *ante*, pp. 3, 4, 34, not only must the deed be executed by her, but she must, as already stated, acknowledge the same before a commissioner duly appointed to take the acknowledgments of married women, or before a judge of the High Court or of a County Court. Before the commissioner receives an acknowledgment he must inquire of the married woman separately and apart from her husband and from the solicitor concerned in the transaction whether she intends to give up her interest in the estate to be passed by the deed without having any provision made for her, and if she answers in the affirmative he is, if he does not doubt the truth of her answer, to receive the acknowledgment; but if it appears to him that it is intended that provision is to be made for her, the commissioner is not to take her acknowledgment until the instrument making such provision is produced to him; or if the provision has not been made, the commissioner must require the terms of the intended provision to be shortly reduced into writing, and verify it by his signature in the margin, or at the foot or back thereof. A

(*a*) See 1 Steph. Com. ch. 16.
(*b*) See Bl. Com. vol. 2, ch. 17.
(*c*) 22 & 23 Vict. c. 35, s. 12.

memorandum of the acknowledgment must be indorsed on the deed or be written at the foot or margin thereof, and be signed by the person taking the acknowledgment.(*a*)

No person authorised to take acknowledgments of deeds by married women who is interested or concerned either as a party, solicitor, or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the acknowledgment can take the acknowledgment; and if taken by a person other than a judge, a declaration that such person is not so interested or concerned must be added to the memorandum of acknowledgment.(*b*)

The 45 & 46 Vict. c. 39, and the rules made thereon, however, provide that a deed acknowledged before or after the commencement of this Act (1st Jan., 1883) by a married woman before a judge, or commissioner, is not to be impeached by reason only that such judge or commissioner was interested or concerned as a party, or as solicitor or clerk to the solicitor for one of the parties, or otherwise, in the transaction giving occasion for the acknowledgment.(*c*)

Prior to the 1st Jan., 1883, in addition to the acknowledgment, a certificate of the acknowledgment signed by the person or persons taking it, and an affidavit of verification, were necessary, which were filed in the central office of the High Court, and on filing the certificate the deed by relation took effect from the time of acknowledgment, and an office copy of the certificate was obtained, which went with the title deeds.(*d*) Since the above date, however, it is provided, by the Conveyancing Act, 1882, that where the memorandum of acknowledgment purports to be signed by the person authorised to take such acknowledgments, the deed, so far as regards the execution thereof by the married woman, is to

(*a*) See 3 & 4 Will. 4, c. 74, ss. 79-84; 45 & 46 Vict. c. 39, s. 7; Conv. Rules, December 1882, rr. 2, 3, 5 made hereon.

(*b*) Conv. Rules, December 1882, rr. 1, 4.

(*c*) 45 & 46 Vict. c. 39, s. 7, sub-s. 3; Conv. Rules, December 1882, r. 6.

(*d*) 3 & 4 Will. 4 c. 74, ss. 85-88, which sections are now repealed by 45 & 46 Vict. c. 39, s. 7, sub-s. 4.

take effect at the time of acknowledgment, and is to be conclusively taken to have been duly acknowledged. So much of the statute 3 & 4 Will. 4, c. 74, as required the certificate and affidavit, viz., sect. 84, from and including the words "and the same judge," to the end of the section, and sects. 85 to 88 inclusive, being repealed by this Act.(*a*)

And, as before stated, the 44 & 45 Vict. c. 41, s. 39, enacts that notwithstanding a married woman is restrained from anticipation, the court may, if it thinks fit, where it appears to be for her benefit, and with her consent, by judgment or order, bind her interest in the property.

This was done for payment of the wife's debts.(*b*)

And by sect. 40 of this Act it is enacted that, as to deeds executed after 31st December, 1881, a married woman, whether an infant or not, shall have power as if she were unmarried and of full age, by deed to appoint an attorney on her behalf to execute any deed or do any other act which she might herself execute or do, and the provision of this Act (*c*) relating to instruments creating powers of attorney apply thereto.

When all the necessary parties have duly executed the conveyance, the purchase-money becomes payable to the vendor; and, in all ordinary cases, the purchaser is entitled to have the title deeds and documents delivered up to him. If, however, the estate has been sold in lots, the purchaser of the lot or portion of highest value is, in the absence of stipulation to the contrary, entitled to their custody; but under a condition that the purchaser of the largest lot shall have them, the purchaser of the largest lot in superficial area will be entitled to the deeds.(*d*) And, as before shown, when a vendor retains any part of an estate to which the documents of title relate, he is entitled to retain such documents.(*e*) In such cases the person retaining possession of

(*a*) 45 & 46 Vict. c. 39, s. 7, sub-ss. 2, 4, 5, and Sched.
(*b*) See *Hodges* v. *Hodges*, 46 L. T., N. S. 366; 20 Ch. Div. 749.
(*c*) See Sects. 46 to 48.
(*d*) *Griffiths* v. *Hatchard*, 1 Kay & J. 17.
(*e*) 37 & 38 Vict. c. 78, s. 2, r. 5; *et ante*, p. 38.

the documents gives the acknowledgment and undertaking provided for in the 44 & 45 Vict. c. 41, s. 9, which has already been fully considered, *ante*, p. 50; and if the purchaser requires attested or other copies of such documents to be delivered to him, he must bear the expense thereof, as stated, *ante*, pp. 20, 51.

CHAPTER IV.

MORTGAGES.

THE duties of a solicitor when employed on behalf of a mortgagor are similar, in many respects, to those which devolve upon him when retained on behalf of a vendor. An important difference, however, is that a mortgagee cannot be tied down by any conditions or contract as to title or evidence of title.

It must also be remembered that the 37 & 38 Vict. c. 78, s. 1, does not in terms apply to a mortgage, but only to "any contract for the *sale* of land." And by sub-sect. 8 of sect. 3 of 44 & 45 Vict. c. 41, this section is only to apply to titles and purchases on sales properly so called, notwithstanding any interpretation in the Act.(*a*) The rights of a mortgagee, therefore, remain as before in regard to title. And as a mortgagee merely advances his money upon property as a security for its due repayment with interest thereon, if there be any doubt as to the title or evidence of title, a solicitor should not allow his client to advance his money until all doubts are removed, and the value of the property offered in pledge is ascertained. And in advancing money by way of mortgage, the character of the borrower, as well as the nature of the security offered, and the title to it, must be looked at. It is not usual to lend more than two-thirds of the value of the property.(*b*)

A second mortgage is not a desirable security, as the mortgagee does not get the legal estate, and he may be cut out by a right of tacking being exercised by a first

(*a*) See also sect. 2 (viii.).
(*b*) Lord St. Leonards' Handy Book, 88.

mortgagee who has made a further advance without notice of a second mortgage.(*a*) So under a judgment for foreclosure in an action brought by a second incumbrancer, he will be compelled either to redeem the first mortgage, or to take his judgment subject to the first charge (*b*) unless the court decrees a sale.(*c*)

When money is advanced on mortgage of buildings, the mortgagee should, notwithstanding the provisions in the 44 & 45 Vict. c. 41, as to insurance (to be stated hereafter), have them insured against fire in a definite amount with a provision for inspecting the policy and receipts for premiums on demand.(*d*)

In the mortgage deed a day is named for payment of the principal, and also for the payment of interest thereon. If default is made the mortgagee may proceed to enforce his security. The mortgagor cannot, however, compel the mortgagee to receive his principal without first giving him six calendar months' notice of his intention to pay it off. If a tender of the money be made on the precise day on which the notice expires and is refused, interest ceases to run from that day, provided the mortgagor keeps the money ready, and makes no profit of it.(*e*)

Although the mortgage deed conveys the estate to the mortgagee, subject to the equity of redemption, in equity the mortgagor is nevertheless considered the owner of the estate. He may settle or devise it, subject of course to the rights of the mortgagee, or he may sell it, either subject to the debt, or pay it off out of the purchase-money. However, a person buying an estate subject to a mortgage should either have the concurrence of the mortgagee, or should be satisfied that the account stated by

(*a*) *Marsh* v. *Lee*, L. C. Eq. vol. 2.
(*b*) Sm. Man. Eq., tit. 3, c. 3.
(*c*) 44 & 45 Vict. c. 41, s. 25.
(*d*) 1 Prid. Conv. 449, 11th ed.
(*e*) Coote Mortg. 885, 4th ed.; Lord St. Leonards' Handy Book, 92, 93; Sm. Man. Eq. 308, 319, 8th ed.

the mortgagor is correct, and should give notice to the mortgagee of the sale as soon as it is complete. The purchaser must, however, indemnify the vendor against the debt without any express stipulation to that effect.(*a*)

A mortgagee cannot in the first instance stipulate that, if the interest be not paid at the time appointed, it shall be converted into principal. Before this can be done the interest must first become due, and then an agreement in writing entered into stating that the interest shall be principal. And even this cannot be done to the prejudice of subsequent incumbrances of which the mortgagee had notice at the time of the agreement.(*b*)

If the mortgage deed does not contain any provision for the payment of interest, the mortgagee is, as a rule, entitled to interest from the date of the deed.(*c*)

A clause in a mortgage deed which provides that the interest shall be at the rate of 4 per cent., and if not regularly paid, then at 5 per cent., is not binding on the mortgagor, being in the nature of a penalty.(*d*)

After default made in payment of the mortgage money, the mortgagee may, irrespective of the 44 & 45 Vict. c. 41, take possession of the estate, and having done so, he has a right to add to his debt any sums he may be compelled to pay for arrears of rent, or for maintaining the title to the estate, or for rebuilding ruinous premises, or for necessary repairs, or the expenses of renewing a renewable leasehold, with interest from the time the sums were advanced. But he cannot by contract, or otherwise, entitle himself to make any charge for management. On the other hand, a mortgagee in possession is liable to the mortgagor for the rents and profits he has received or made in the ordinary way, or which but for his wilful default

(*a*) Lord St. Leonards' Handy Book, 93; Sug. V. & P. 198, 14th ed.; Coote Mortg. 654, 4th ed.
(*b*) 2 Spence's Eq. 628, 656; Coote Mortg. 868, 4th ed.
(*c*) Coote Mortg. 867, 4th ed.
(*d*) Coote Mortg. 883, 4th ed.

he might have made. So, if he assigns over his mortgage without the assent of the mortgagor, he is still answerable for the profits to the mortgagor, both before and after the assignment. He must also keep the property in necessary repair.(*a*)

The mortgagee cannot, however, justify committing waste on the estate; therefore he cannot, except under the power given him by the 44 & 45 Vict. c. 41, s. 19 (iv.), cut down timber, unless his security is defective; and if he does so an account will be decreed, and the produce applied, first in payment of the interest, and then in reduction of the principal.(*b*)

The various properties which may be made the subject of a mortgage usually rank in the following order:

Freehold land held in fee simple.

Freehold houses held in fee simple.

Copyhold land and houses.

Long leasehold houses, if unfettered by heavy ground rents or burdensome covenants.

Property used for manufacturing purposes if held in fee, or for a long term of years, unfettered as above stated.

Life estates.

Reversions and remainders.

Policies of life assurance.

Personal chattels.

As will be gathered from the above enumeration, freehold land and houses in fee are the most desirable as a security for money lent on mortgage. But copyhold land and houses, where the fine due on admittance is a nominal one, are almost as good a security as freeholds. Should, however, the fine payable be an arbitrary one, that is, a sum not exceeding two years' improved value of the land, the pro-

(*a*) Sm. Man. Eq. 296, 316, 322, 8th ed.; Coote Mortg. 654, 741, &c., 4th ed.; Lord St. Leonards' Handy Book, 95, 96; *Shepard* v. *Jones*, 21 Ch. Div. 469.

(*b*) Coote Mortg. 745, 4th ed.; Lord St. Leonards' Handy Book, 96.

perty would not be a desirable security, for if the mortgagee wished to enforce his security he would have to be admitted tenant of the manor, and pay the fine.

In London and some other large towns leasehold houses for long terms of years are taken as a security for money lent on mortgage. However, a solicitor should, before advising his client to lend money on property of this tenure, ascertain whether the locality in which the houses are situate is an improving one, that the lease is held on a low ground rent, and contains no burdensome covenants. If these essentials are wanting, the security would not be an advisable one.

It is undesirable to lend money by way of mortgage to speculative builders.(*a*)

Again, serious consideration is necessary before a solicitor can advise his client to advance money by way of mortgage on estates used for manufacturing purposes, as property of this nature is constantly fluctuating in value. During periods of commercial depression it is usually very difficult to realise securities of this kind. If taken as a security not more than one half the value of the property should be advanced upon it. It must be remembered, too, that if the trade machinery is included in such a mortgage, the deed will require registration under the Bills of Sale Acts, 1878 and 1882.(*b*)

Estates in which the owner has only an interest for his life are not desirable as a security for money advanced by way of mortgage, being so uncertain in point of duration. When taken as a security, the mortgagor should be required to insure his life in some good insurance office, and the policy be assigned to the mortgagee as a collateral security, and notice thereof be given to the insurance office.(*c*)

An estate in remainder or reversion, even though vested, is also undesirable as a mortgage security, as it neither gives

(*a*) Lord St. Leonards' Handy Book, 88.
(*b*) 41 & 42 Vict. c. 31, s. 5; 45 & 46 Vict. c. 43, s. 8.
(*c*) 30 & 31 Vict. c. 144, s. 3.

an immediate right to possession, nor affords any fund for discharging either principal or interest, and the mortgagee, having no right to the custody of the title deeds, is liable to take subject to any incumbrances already created by the mortgagor, the existence of which the lender has no means of discovering.(*a*) And, subject to the alteration made by the 31 Vict. c. 4, the bargain is liable to be set aside by the court, if unfair.(*b*) If the reversionary interest be contingent, the security offered is still more objectionable than when vested, as it may never be vested, and consequently fail altogether.

A policy of life assurance standing alone affords a very inadequate mortgage security, as there is, during the borrowers' life, no fund to resort to for payment of the interest on the money advanced. In addition to which, the punctual payment of the annual premiums on the policy have to be provided for.(*c*) So the mortgagor may do some act to avoid the policy during his life. However, a security of this nature is sometimes taken to secure a pre-existing debt; or under a marriage settlement, where the trustees thereof are authorised to make advances out of trust moneys to the husband upon his effecting a policy of assurance on his life and assigning the policy to the trustees as a security for repayment of the advances. If an existing policy of life assurance is taken as a security, inquiry should be made at the insurance office to ascertain if there are any prior incumbrances on the policy. And notice of the assignment must also be given to the insurance office, in order to prevent a subsequent incumbrancer, without notice of the prior charge, gaining priority by giving notice of his incumbrance to the insurance office (*d*), or of even losing the benefit of the policy by a payment by the company. And until this notice

(*a*) See 1 Hughes' Conv. 368; Coote Mortg. 376, 893, 4th ed.
(*b*) Coote Mortg. 893, 894, 4th ed.
(*c*) Coote Mortg. 500, 4th ed.
(*d*) See *Consolidated Insurance Company* v. *Riley*, 1 L. T., N. S. 209; 1 Giff. 371.

is given the assignee cannot sue in his own name for the amount due on the policy on the death of the assured.(*a*)

Personal chattels are not an advisable security for money lent, as they are liable to deteriorate in value by effluxion of time and by use. Should money be lent on such a property the repayment thereof is secured by a registered bill of sale.(*b*)

Where money is wanted at once and for a short period only, an equitable mortgage created by deposit of title deeds may be resorted to.(*c*) An equitable mortgage may also be created by an agreement or direction in writing, showing the debtor's intention to make his lands or property a security for a debt or money advanced.(*d*)

When deeds are deposited as a security, a memorandum of deposit should accompany them, as it facilitates proof of the intention; but it is not essential.(*e*)

It is not usual to put a mortgagor to the expense of investigating his title to the property charged by an equitable mortgage. Still, no solicitor should advise his client to lend money upon a security of this kind, unless he has good reason to believe the title to be a safe one, and that the borrower is the lawful owner of the property. And the solicitor should ascertain that the whole of the documents are deposited, for otherwise the depositor, by retaining some of them, and depositing them with a third party, might cause a claim as to priority to arise.(*f*)

If the equitable mortgage is perfected by a conveyance or surrender, the costs thereof fall upon the mortgagor.(*g*)

Before an advance of money is made by way of mortgage, the value of the property which is offered as security must be ascertained by a duly qualified surveyor and valuer. A solicitor is not answerable for the value of the estate pledged,

(*a*) 30 & 31 Vict. c. 144, s, 3.
(*b*) See 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43.
(*c*) See *Russell* v. *Russell*, 1 L. C. Eq. 541, 2nd ed.
(*d*) Coote Mortg. 305, 306, 4th ed.
(*e*) See Story's Eq., s. 1020, &c.
(*f*) See Hughes' Pr. Conv. 328.
(*g*) *Pryce* v. *Bury*, 2 Drew. 41.

unless he renders himself liable by his conduct, for it does not fall within his province to value estates.(*a*)

Trustees are now authorised to advance money upon (*inter alia*) real security in any part of the United Kingdom, unless forbidden by the instrument creating the trust.(*b*)

The value of the property offered as a security being found sufficient and the title to it sound, the next step taken by the solicitor for the mortgagee is to prepare the draft mortgage deed, and forward it to the solicitor for the mortgagor for his perusal and approval. However, before we proceed to state the practice further, we will now consider the form and requisites of the mortgage deed itself. In simple cases, and for loans on small properties, no doubt the forms given by the 44 & 45 Vict. c. 41, will be used. The third schedule to this Act gives a form of statutory mortgage of freehold or leasehold land; and in a mortgage by a deed expressed to be made by way of statutory mortgage in such form (*c*), there is to be deemed to be included, and to be implied, (1) a covenant with the mortgagee, by the person expressed therein to convey as mortgagor, to the effect that the mortgagor will, on the stated day, pay to the mortgagee the stated mortgage money, with interest thereon in the meantime at the stated rate, &c.; and (2) a proviso that, if the mortgagor, on the stated day, pays to the mortgagee the stated mortgage money, with interest at the stated rate, the mortgagee will, at any time thereafter, at the request and cost of the mortgagor, reconvey the mortgaged property to him, or as he shall direct (sect. 26).

And by sect. 7, in a conveyance by way of mortgage, a covenant by a person who conveys and is expressed to convey as beneficial owner, is to be deemed to be included and implied in the conveyance, as far as regards the subject-matter, or share of the subject-matter, expressed to be con-

(*a*) Lord St. Leonards' Handy Book, 88.

(*b*) See 22 & 23 Vict. c. 35, s. 32; 23 & 24 Vict. c. 38, s. 11; 28 & 29 Vict. c. 78, s. 40; Ord. 1, Feb. 1861.

(*c*) It will be noticed that a statutory mortgage can only be made by *deed* and of freehold or leasehold land.

veyed by him, to the effect that he has, with the concurrence of every other person, if any, conveying by his direction, full power to convey, &c.; and that if default be made in payment of the mortgage money or interest, or any part thereof, that the mortgagee, and persons deriving title under him, may enter into peaceable and quiet possession of the mortgaged property, free from incumbrances, and for further assurance: (see sub-sect. 1, C.)

And by the same section, in a conveyance by way of mortgage of leasehold property, the further covenant, by a person who conveys and is expressed to convey as beneficial owner, that the lease or grant creating the term is valid and in full force, unforfeited, and unsurrendered, not void or voidable, and that the rents reserved by, and the covenants, &c., contained in the lease or grant on the lessee's or grantee's part, &c., have been paid, observed, and performed; and that the mortgagor and those deriving title under him will, so long as any mortgage money remains due, pay the rents reserved by, and perform the covenants, &c., contained in the lease or grant, on his and their part to be paid, observed, and performed, and will keep the mortgagee, and those deriving title under him, indemnified against all actions, proceedings, costs, &c., if any, incurred or sustained by him or them by reason of the non-payment of such rents or non-observance or non-performance of such covenants, &c.: (see sub-sect. 1, D.)

And by sect. 28 of this Act, as will be fully shown in subsequent pages, in a deed of statutory mortgage or statutory transfer of mortgage, where more persons than one are expressed to convey as mortgagors, &c., or where there are several mortgagees or transferees, implied covenants are deemed joint and several, &c.

The same Act, sect. 18, also enacts that a mortgagor of land (*a*), while in possession, shall as against every incum-

(*a*) Land includes land of any tenure, and tenements and hereditaments corporeal and incorporeal, and houses and other buildings, &c., unless a contrary intention appears (sect. 2, ii.).

brancer, have power to make such leases of the mortgaged land, or any part thereof, as is stated *infra* (sub-sect. 1); and a mortgagee of land, while in possession, shall, as against all prior incumbrancers, if any, and as against the mortgagor, have power to make similar leases (sub-sect. 2). These leases are :

(1.) An agricultural or occupation lease for any term not exceeding twenty-one years.

(2.) A building lease for any term not exceeding ninety-nine years (sub-sect. 3).

Every such lease must be made to take effect in possession not later than twelve months after its date; and reserve the best rent, but without any fine taken; and must contain a covenant by the lessee for payment of rent, and a condition of re-entry on default thereof within a time specified, not exceeding thirty days. A counterpart of the lease must be executed by the lessee and be delivered to the lessor; the execution of the lease by the lessor being sufficient evidence thereof in favour of the lessee and all persons deriving title under him (sub-sects. 4-8).

A building lease must be made in consideration of the lessee, &c., having erected, or agreeing to erect within a time not exceeding five years from the date of the lease, new or additional buildings, or of having improved or repaired buildings, or agreeing to improve or repair them within that time, or of having executed or agreeing to execute within that time an improvement on the land for or in connection with building purposes. The rent for the first five years, or any less part of the term, may be a peppercorn or nominal rent, or other rent less than the rent ultimately payable (sub-sects. 9, 10).

Where a lease is made by a mortgagor, he must, within a month after making it, deliver to the mortgagee, or to the mortgagee first in priority, if more than one, a counterpart of the lease executed by the lessee. The lessee, is not, however, to be concerned to see that this provision is complied with (sub-sect. 11); but if the mortgagor makes default therein, the statutory power of sale arises (sect. 20, iii.).

Sect. 18 applies only if and as far as a contrary intention is

not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, &c.; and nothing in the Act is to prevent further or other powers of leasing being reserved by the mortgage deed to the mortgagor or mortgagee, or both; and any further or other powers so reserved are to be exercisable, as far as may be, as if conferred by this Act, and with all the like incidents, &c., unless a contrary intention is expressed in the mortgage deed (sub-sects. 13, 14).

Nothing in the Act is to be construed to enable a mortgagor or mortgagee to make a lease for any longer term, or on any other conditions, than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this Act had not been passed (sub-sect. 15).

Sect. 18 applies only to mortgages made after the commencement of this Act; but the provisions thereof may, by written agreement after the commencement of the Act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of the Act, if the agreement does not prejudicially affect the right or interest of any mortgagee not joining in or adopting the agreement (sub-sect. 16).

The provisions of this section referring to a lease are to be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting (sub-sect. 17).

The provisions of sect. 18 remove serious difficulties previously existing in granting leases of mortgaged property, and will be specially useful in reference to leases of buildings.(*a*)

By sect. 19, where a mortgage is made by deed, the mortgagee is to have the following powers, to the same extent as if conferred by the mortgage deed; to be exercised, however, only in the events and under the conditions mentioned in subsequent sections:

(*a*) See Wolstenholme and Turner's Conv. Acts, 46, n.; and see *post*, tit. "Leases."

(1) A power, when the mortgage money has become due, to sell, or concur in selling, the mortgaged property, or any part of it, either subject to prior charges or not, and either together or in lots, by public auction or private contract, subject to such conditions, as to title, &c., as the mortgagee thinks fit, with power to vary or rescind the contract of sale, to buy in and resell, without being answerable for any loss occasioned thereby.

(2) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire,(*a*) any insurable part of the mortgaged property, whether affixed to the freehold or not, and the premiums paid for any such insurance are to be a charge on the mortgaged property in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money.

(3) A power when the mortgage money has become due to appoint a receiver of the income of the mortgaged property or any part thereof.

(4) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, not planted or left standing for shelter or ornament, or to contract for such cutting and sale, to be completed within twelve months from the making of the contract.

The provisions relating to the foregoing powers may be varied or extended by the mortgage deed, and, as so varied or extended, are to operate in like manner and with the like incidents, &c., as if contained in the Act. This section (19) only applies where the mortgage deed is executed after the commencement of the Act, and only if and as

(*a*) It is, however, still thought advisable that a mortgage deed of buildings should, as a rule, contain a covenant by the mortgagor to insure in a certain amount against fire, and to produce the policy and receipt to the mortgagee on demand; but not any further provision for the mortgagee to insure on mortgagor's default, as on this point the Act is sufficient: (1 Prid. Conv. 449, 11th ed.)

far as a contrary intention is not expressed in the mortgage deed (see sub-sects. 1-4).

This section is in substitution for the 23 & 24 Vict. c. 145, ss. 11-24, being part 2 of that Act, which part is repealed by 44 & 45 Vict. c. 41, schd. 2, pt. 3. The powers given by this Act are more complete and extensive than those given by the repealed Act.

The mortgagee cannot exercise the power of sale conferred by this Act until (1) notice requiring payment of the mortgage money has been served on the mortgagor (*a*), or one of several mortgagors, and default made in payment thereof, or of part thereof, for three months after service; or (2) some interest under the mortgage is in arrear and unpaid for two months; or (3) there has been a breach of some provision contained in the mortgage deed, or in this Act, on the part of the mortgagor, or of some one concurring in the mortgage, to be observed or performed, other than the covenant for payment of principal or interest: (44 & 45 Vict. c. 41, s. 20.)

When the mortgagee exercises the power of sale conferred by this Act, he has power, by deed, to convey the property sold for such estate and interest therein as is the subject of the mortgage, free from all estates, interests, and rights ranking after his mortgage, but subject to such estates and interests and rights as have priority to his mortgage. Saving, however, that if the mortgaged property be copyhold or customary land the legal right to admittance is not to pass by deed, unless a deed is sufficient by law or custom for such a purpose (sect. 21, sub-sect. 1).

Customary freeholds in some cases will pass by deed of grant, in others by bargain and sale, the title being, however, completed in each case by admittance.(*b*)

(*a*) The notice may be addressed to the mortgagor, by that designation, without his name, and may be left at his last known place of abode or business in the United Kingdom, or may be affixed or left for him on the land or any house or building comprised in the mortgage: (44 & 45 Vict. c. 41, s. 67, sub-ss. 2, 3.)

(*b*) See Burt. Comp. pl. 1283; Scriv. Cop. 414, &c., 5th ed.

Under the power of sale given by the Act the mortgagee will proceed as under the ordinary power of sale in a deed.(*a*)

Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser cannot be impeached on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified thereby has his remedy in damages against the person exercising the power: (44 & 45 Vict. c. 41, s. 21, sub-s. 2.)

The proceeds of the sale, after the discharge of prior incumbrances, if any, or after payment into court under this Act of a sum to meet any prior incumbrance, are to be held by the mortgagee in trust to be applied by him (1) in payment of the costs and expenses properly incurred as incident to the sale; (2) in discharge of the mortgage money, interest and costs, and other money, if any, due under the mortgage; and (3) the residue thereof is to be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof (sub-sect. 3).

Sect. 5 of this Act (*b*) provides for the payment of money into court on a sale of incumbered property, the amount paid in being fixed by the court. After the money is paid in, the court has power, with or without notice to the incumbrancer, to declare the land freed from the incumbrance, and to make an order for conveyance, or vesting order, to give effect to the sale, and give directions for the retention and investment of the money in court, or for its payment out to the persons entitled thereto after notice served on them: (see sub-sects. 1-4, and sect. 67.)

The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give

(*a*) See Wolstenholme and Turner's Conv. Acts, 49.
(*b*) As to the construction of this section see *Patching* v. *Bull*, 46 L. T., N. S. 227.

a discharge for the mortgage money (44 & 45 Vict. c. 41, s. 21, sub-s. 4). By sect. 30 of this Act mortgaged estates of inheritance, &c., on the death of a sole mortgagee, devolve to and become vested in his personal representatives, notwithstanding any testamentary disposition thereof, and they have power to dispose of and deal with the same, as if the same were a chattel real (sub-sect. 1). They may, therefore, exercise the power of sale given by this Act.

The power of sale given by this Act does not affect the mortgagee's right of foreclosure (44 & 45 Vict. c. 41, s. 21, sub-s. 5). The mortgagee, his executors, administrators, or assigns, are not to be answerable for any involuntary loss happening in the exercise of the power of sale conferred by this Act (sub-sect. 6).

When the power of sale conferred by this Act has arisen, the person entitled to exercise it may demand and recover from any person, other than one having in the mortgaged property an estate, interest, or right prior to the mortgage, the deeds and documents relating to the property or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover (sub-sect. 7).

The receipt in writing of a mortgagee is a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee is not to be concerned to inquire whether any money remains due under the mortgage. The money received by a mortgagee under his mortgage, or from the proceeds of securities comprised in his mortgage, is to be applied in the same way as money received by him arising from a sale under the power of sale conferred by this Act (see *ante*, p. 76); but the costs and expenses properly incurred in recovering and receiving the money or securities, and of converting securities into money, are to be payable instead of those incident to a sale: (44 & 45 Vict. c. 41, s. 72, sub-ss. 1, 2.)

Thus, the mortgagee may not only give a discharge for

money arising by a sale, but also for money or securities assigned by him.(*a*)

Under the power in this Act enabling a mortgagee to insure against loss or damage by fire, the amount of insurance must not exceed the amount specified in the mortgage deed, or, if no amount is specified, must not exceed two-thirds of the sum that would be required to restore the property in case of total destruction: (44 & 45 Vict. c. 41, s. 23, sub-s. 1.)

The mortgagee is also prohibited from insuring under the power given by this Act (1) where the mortgage deed contains a declaration that no insurance is required; (2) when the mortgagor insures in accordance with the mortgage deed; or (3) there being no stipulation as to insurance in the mortgage deed, the mortgagor nevertheless insures to the amount in which the mortgagee is by this Act authorised to insure (sub-sect. 2).

The insurance money, whether received on an insurance effected under the mortgage deed or under this Act, must, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage for which the money is received, and subject to any obligation to the contrary imposed by law or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage (sub-sects. 3, 4).

As to an obligation imposed by law, the 14 Geo. 3, c. 78, s. 83, provides that insurance money on houses and buildings situate within the Metropolitan Buildings Acts, must, at the request of any person interested, or in case of suspicion may, be applied in reinstating the houses or buildings.

When the mortgagee is entitled to appoint a receiver under the power conferred by this Act, he cannot exercise that power until he has become entitled to exercise the power

(*a*) See Wolstenholme and Turner's Conv. Acts, 51, n.

of sale conferred by this Act; but then he may, by writing under his hand, appoint such person as he thinks fit to be receiver. Such receiver is to be deemed to be the agent of the mortgagor, who is to be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides: (44 & 45 Vict. c. 41, s. 24, sub-ss. 1, 2.)

The receiver has power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name of the mortgagor or mortgagee, to the extent of the mortgagor's estate or interest, and to give effectual receipts for the same; and the persons paying the money need not inquire whether any case has happened to authorise the receiver to act (sub-sects. 3, 4).

The receiver may be removed, and a new one appointed from time to time by the mortgagee by writing under his hand (sub-sect. 5).

The receiver may retain out of moneys received by him for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission, at a rate specified in his appointment, not exceeding 5 per cent. on the gross amount received, and, if no rate is specified, then at the rate of 5 per cent. on that gross amount, or at such higher rate as the court may allow, on application made for that purpose (sub-sect. 6).

The receiver must, if directed in writing by the mortgagee, insure the mortgaged premises against loss or damage by fire out of money received by him (sub-sect. 7).

The receiver must apply all moneys received by him as follows: (1) in discharge of all rents, rates, taxes, and outgoings affecting the mortgaged property; (2) in keeping down all annual sums or other payments, and the interest on all principal sums having priority to the mortgage in right whereof he is receiver; (3) in payment of his commission, and the premiums on fire, life, or other insurances, properly payable under the mortgage deed or this Act, and the cost of necessary or proper repairs directed in writing by

the mortgagee; (4) in payment of the interest accruing due on the principal money due under the mortgage; and (5) the residue is to be paid to the person who, if there were no receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property (sub-sect. 8).

Such are the powers given to mortgagees in mortgages made since the commencement of the 44 & 45 Vict. c. 41 (1st January, 1882).

From the foregoing pages it will be gathered that, if freehold or leasehold property is mortgaged by a statutory mortgage deed under this Act, it will consist of the following parts:

1. The date and parties.

2. The testatum, setting forth the amount advanced by the mortgagee and the receipt thereof by the mortgagor, the conveyance by the mortgagor, as mortgagor, and as beneficial owner of all the premises.

3. The habendum to the use of the mortgagee for securing payment of principal and interest.

4. If the property consists of houses or buildings, a covenant to insure against fire.(*a*)

5. The witnessing part.

It will be remembered that, in a deed expressed to be made by way of statutory mortgage, a covenant for payment of principal and interest and a proviso for redemption are implied by the Act (see *ante*, p. 70). Covenants for title are also implied by stating the character in which the person conveys (*ante*, p. 70). And in all mortgages by deed the powers set out in the foregoing pages are supplied, being powers for a mortgagor or mortgagee when in possession to lease; for a mortgagee to sell and insure against fire,(*a*) and if in possession, to cut timber, to appoint a receiver, and to give receipts for proceeds of the sale, &c., with trusts thereof, if a contrary intention is not therein expressed.

(*a*) See note, *ante*, p. 74.

The deed must be expressed to be by way of statutory mortgage in order that the Act may apply. And the forms given by the Act may require to be supplemented. For, as before shown (*a*), it is advisable to have an express covenant to insure the property; so a covenant to keep it in repair may be useful, especially when it consists of leasehold buildings. It may also be found advisable to give an express power of sale to arise on default in repayment, without giving the mortgagor the three months notice required by the Act.

In the fourth schedule to the 44 & 45 Vict. c. 41, another short form of a mortgage deed is given where money is advanced on a joint account.

It has hitherto been the practice, when money was advanced by way of mortgage by trustees, to insert a clause in the mortgage deed that the money was advanced by them on a a joint account, not as trustees, but by name, and that the receipt of the survivor should be a sufficient discharge for the mortgage money. The trust was shown by a separate deed.(*b*) For otherwise equity would have raised the presumption that the money was advanced in equal shares, and on the death of one of the trustees the survivor could not have given a discharge for the mortgage money.

The 44 & 45 Vict. c. 41, however, enacts that where in a mortgage, money obligation, or transfer thereof, the money advanced or owing is expressed to be advanced by or owing to more persons than one, as money belonging to them on a joint account; or where a mortgage, money obligation, or transfer is made to more persons than one jointly, and not in shares, the money due to them thereon is to be deemed to be and remain money belonging to them on a joint account as between them and the mortgagor and obligor; and the receipt in writing of the survivors or survivor of them, or of the personal representatives of the last survivor, is to be a complete discharge for the money due, notwithstanding notice to the payer of a severance of the joint account (sect. 61, subsect. 1).

(*a*) See note, *ante*, p. 74. (*b*) Lewin on Trusts, 246, 4th ed.

This section only applies to a mortgage, obligation, or transfer, made after the commencement of this Act, and only if and as far as a contrary intention is not expressed therein, &c. (sub-sects. 2, 3).

Since the commencement of this Act the joint account clause and power for the survivor to give a receipt for the money will no longer be necessary. The section applies either whether the advance is expressly stated to be on a joint account, or where the security is not expressly made to persons in shares; still, although the joint account is not necessary, it is convenient as a direct statement of the rights of the mortgagees.(*a*)

The draft deed having been sent to the mortgagor's solicitor for approval, he peruses and approves of it, and makes a fair copy, and returns the original draft to the mortgagee's solicitor, who has it engrossed. The engrossment and draft deed are then forwarded by the mortgagee's solicitor to the solicitor for the mortgagor for examination and comparison. The practice being as on a sale.(*b*)

Searches for incumbrances should now be made by the mortgagee's solicitor as on a sale.(*c*)

An appointment to complete the matter is then arranged. At the time appointed the mortgagor attends and executes the mortgage deed, and if he is married and it has been necessary to make his wife a party in order to bar her dower, she must execute the deed and acknowledge it, as previously directed on a sale. The mortgage money is then handed to the mortgagor and the title deeds and mortgage deed are given up to the mortgagee.

It is usual to deduct the amount of the charges of the mortgagee's solicitor from the mortgage money, as the mortgagor pays all costs incurred in respect of the mortgage.

If the property mortgaged lies in one of the register

(*a*) See Wolstenholme and Turner's Conv. Acts, 82, n.
(*b*) See *ante*, p. 55. (*c*) See *ante*, p. 55.

counties the deed must be registered, as on a sale. And, as before shown, it may require registering under the Bills of Sale Act.

A mortgage of copyhold property is effected by surrender thereof, subject to a condition that on payment by the mortgagor to the mortgagee of the money lent, with interest thereon, at the rate stipulated, on a given day, the surrender is to become void. And unless the mortgagee wishes to enforce his security he seldom gets admitted as tenant of the mortgaged property, as by this means the fine due to the lord of the manor on admittance is avoided until there is an actual necessity for it. (*a*) It has hitherto, however, been the practice to prepare a deed of covenants to precede or follow the conditional surrender. If made before the surrender, the deed recites the agreement for the loan, then comes a covenant by the mortgagor for payment of the principal money and interest; next a covenant to make the conditional surrender to the use of the mortgagee according to the custom of the manor, with a power of sale in default of payment; covenants to insure the buildings against fire and to repair, and absolute covenants that the mortgagor has good right to surrender, for quiet enjoyment by the mortgagee free from all incumbrance, and for further assurance. (*b*)

The conditional surrender follows:

The 44 & 45 Vict. c. 41, does not as a rule, says a learned commentator, (*c*) apply to copyholds except where they can be dealt with as freeholds; for instance, where they pass by deed and admittance, or where an equity is conveyed.

However, by the interpretation clause of the Act (sect. 2, v.) "conveyance," unless a contrary intention appears, includes (*inter alia*) a covenant to surrender, made by deed, on a sale or mortgage of any property. It follows, says Mr.

(*a*) Will. Real Pro. 431, 432, 13th ed.
(*b*) 1 Hughes' Pr. Conv. 382; David. Conc. Conv. 1590, 10th ed.
(*c*) Wolstenholme and Turner's ed. 31, n.

Prideaux (*a*) that if a person, as beneficial owner, covenants to surrender, covenants for title will be implied.

A mortgage of leaseholds for years is effected either by an assignment of the whole of the remaining portion of the original term to the mortgagee, or by way of an underlease thereof to him; the latter course is usually adopted in practice, as by this means the mortgagee is protected against the liability to pay the rent reserved by the original lease, and perform the covenants contained in it running with the land, to which, in the character of assignee of the term, he would be liable. (*b*) However, if the rent reserved in the original lease be a merely nominal one, or even a low rent, and the covenants contained therein be not burdensome, or are beneficial to the tenant, as a covenant for renewal on advantageous terms, an assignment of the term would not be objectionable. (*c*)

A mortgage of leasehold property may be made by way of statutory mortgage, as stated *ante*, pp. 70, 71, 80. But if such form be not adopted, a mortgage deed by way of underlease would, after the date and parties, recite the original lease, and briefly any mesne assignments there may have been, and also the agreement for the loan. Then comes the covenant to pay principal and interest; the demise of the term by the mortgagor, as beneficial owner, to the mortgagee, to hold to him for all the residue thereof, except some small reversion, usually the last three days; and a declaration of trust of the residue of the term for the benefit of the mortgagee; and a proviso for redemption. Covenants for title are implied by the demise as beneficial owner. But covenants to insure the premises against fire (*d*) and to repair may be added, as also an express power of sale, to arise on default, if thought necessary, as leaseholds deteriorate by effluxion of time.

(*a*) Pract. Conv. 231, 11th ed.
(*b*) Coote Mortg. 108, &c., 3rd ed.
(*c*) See 1 Hughes' Pr. Conv. 375.
(*d*) See note *ante*, p. 74; and for a form see 1 Prid. Conv. 513, 515, 11th ed.; Wolstenholme and Turner's Conv. Acts, 163.

If the mortgage is by way of assignment, the whole term is assigned to the mortgagee, and of course there can be no declaration of trust of the residue.

Should the original lease contain a covenant or proviso against assigning or underletting without the licence or consent of the lessor, his consent must be obtained before a valid mortgage can be made. If the consent is obtained, the fact should be briefly recited in the mortgage deed, and the licence itself delivered to the mortgagee on completion of the mortgage.

If the lease is determinable on lives, a policy of life assurance upon one, at least, of the lives should be effected, and assigned by way of collateral security to the mortgagee. The deed, after the date and parties, would recite the title of the mortgagor in the property, the policy of assurance, and the agreement for the loan. The first testatum would, in consideration of the advance, contain the covenant for payment of principal and interest; the second testatum would demise the mortgagor's interest in the property as beneficial owner, to hold unto the mortgagee, subject to the proviso for redemption; and by the third testatum the mortgagor, as beneficial owner, would assign the policy to the mortgagee, to hold subject to the proviso for redemption. The proviso for redemption follows; also a covenant to keep up the policy, &c., and to insure the buildings, and any other covenant that special circumstances may require. (*a*) And notice of the assignment of the policy must be given to the insurance office.

If the original lease contains a covenant or proviso for renewal, the mortgagor should by the mortgage deed covenant to effect such renewal, and in case of default that the mortgagee may do so and charge the fine payable thereon, if one, and all other incidental expenses, together with interest on the total amount expended by way of further charge upon the mortgaged premises, with a further covenant by the mort-

(*a*) See a form, Wolstenholme and Turner's Conv. Acts, 164. And as to implied covenants see *ante*, pp. 70, 71.

gagor to repay to the mortgagee all such sums as the latter shall so expend, with interest thereon at the same rate as that reserved upon the mortgage. However, a mortgagee is entitled to the expenses of renewing a renewable leasehold, with interest thereon from the time the sum was advanced, without express stipulation. (*a*) A covenant for renewal is a covenant running with the land. (*b*)

A policy of life assurance is mortgaged by way of assignment. A form is given by the 30 & 31 Vict. c. 144. If this form be not used the deed, after the date and parties, recites that the mortgagor is entitled to a policy of life assurance effected in his own name and on his own life, in a certain office, to a certain amount; and the agreement for the advance thereon. The covenant for payment of principal and interest follows. The policy is then assigned by the mortgagor as beneficial owner to the mortgagee, to hold subject to the proviso for redemption. The proviso for redemption follows. And the mortgagor covenants not to do any act to vitiate the policy, and to pay the premiums thereon, and in default that the mortgagee may do so. (*c*) The powers of sale given by the 44 & 45 Vict. c. 41, may be supplemented by giving the mortgagee power to surrender the policy to the insurance office. Covenants for title will be implied by the mortgagor conveying as beneficial owner; and trusts for the application of the money received under the policy and the power for the mortgagor to give receipts may be omitted, sect. 22 of the Act being sufficient.

OF BILLS OF SALE.

When money is advanced upon the security of personal chattels the mode of their transfer is by registered bill of sale.

By the 45 & 46 Vict. c. 43, however, every bill of sale made in consideration of any sum under 30*l.* is void (sect. 12). Therefore, if the amount advanced be under this sum,

(*a*) See Coote Mortg. 242, 4th ed.
(*b*) Redman and Lyon L. & T. 249, 2nd ed.
(*c*) See a form, Wolstenholme and Turner's Conv. Acts, 164.

the debt must be secured either by a bond, with or without sureties, or by a bill of exchange, or a promissory note.

A bill of sale made or given by way of security for the payment of money by the grantor is void unless made in accordance with the form given in the schedule to the 45 & 46 Vict. c. 43 (sect. 9). The bill of sale must have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised therein; and such bill of sale, save as presently to be mentioned, has effect only in respect of the personal chattels specifically described in the schedule; and, except as against the grantor, is to be void in respect of any personal chattels not so described (sect. 4).

Further, save as mentioned *infra*, a bill of sale is to be void, except as against the grantor, in respect of personal chattels which are so specifically described in the schedule thereto, but of which the grantor was not the true owner at the time of the execution of the bill of sale (sect. 5).

The following things are excepted from the above sections, and may be included in the bill:

(1.) Growing crops separately assigned or charged, if actually growing at the time of the execution of the bill of sale.

(2.) Fixtures separately assigned or charged, and any plant, or trade machinery, where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, house, warehouse, or other place *in substitution* for any of the like fixtures, plant, or trade machinery specifically described in the schedule to the bill of sale (sect. 6).

It will be noticed that sects. 4 and 5 render the bill void as against persons other than the grantor. Therefore it would appear that an assignment of property to be afterwards acquired is good as against the grantor. And it had been held, prior to this enactment, that an assignment, since the Judicature Acts, of effects to be afterwards acquired, if so described as to be capable of being identified, was valid both

at law and in equity.(*a*) Before these Acts such an assignment was good in equity, though not at law.(*b*)

A bill of sale will now consist of (1) the date and parties; (2) the testatum, where, in consideration of the sum advanced by the grantee to the grantor, the receipt of which is thereby acknowledged, the grantor assigns unto the grantee, his executors, administrators, and assigns, all the chattels, &c., specifically described in the schedule annexed, as security for payment of the principal sum and interest thereon; (3) a covenant by the grantor for the payment of principal and interest; and (4) to insure the chattels against fire, as also any other covenant or agreement that the parties may agree to for the maintenance or defeasance of the security; (5) and lastly comes a proviso that the chattels assigned are not to be liable to seizure, or to be taken possession of by the grantee for any cause other than those specified in sect. 7 of the Bills of Sale Act (1878) Amendment Act, 1882.(*c*)

The consideration for which the bill of sale was given must be truly set forth, otherwise the bill of sale is void in respect of the personal chattels comprised therein.(*d*)

An early day is generally appointed for repayment, as circumstances may arise, from the nature of the security, for realising before the expiration of the usual six months allowed in mortgages of land.(*e*)

To prevent a power to seize being harshly exercised, the 45 & 46 Vict. c. 43, s. 7, provides that personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee, unless (1) the grantor makes default in payment of the sum or sums thereby

(*a*) See *Lazarus* v. *Andrade*, 5 C. P. Div. 318; 49 L. J., C. P. 647; and see *Re Count d'Epineuil*, 20 Ch. Div. 758.
(*b*) *Holroyd* v. *Marshall*, 33 L. J. Ch. 191; 7 L. T., N. S. 172.
(*c*) See sects. 7, 9, and Schedule to the Act.
(*d*) 45 & 46 Vict. c. 43, s. 8; and see *Ex parte Ralph, re Spindler*, 45 L. T., N. S. 412; *Ex parte Firth, re Cowburn*, 46 *id.* 120; *Ex parte Challoner, re Rogers*, 16 Ch. Div. 260.
(*e*) See Prid. Conv. 701, 704, 11th ed.

secured at the time therein provided for payment, or in the performance of any covenant or agreement contained therein and necessary for maintaining the security; or (2) unless the grantor becomes bankrupt, or suffers the said goods or any of them to be distrained for rent, rates, or taxes; or (3) fraudulently removes or suffers them, or any of them, to be removed from the premises; or (4) if he does not without reasonable excuse, upon written demand by the grantee, produce his last receipt for rent, rates, and taxes; or (5) if execution is levied against the grantor's goods under a judgment at law.

The grantor may, within five days from any such seizure or possession, apply to the High Court or to a judge at chambers, and such court or judge, if satisfied that by payment or otherwise the cause of seizure no longer exists, may restrain the grantee from removing or selling the chattels, or may make such other order as may seem just (sect. 7). And by sect. 13 chattels seized or taken possession of under a registered bill of sale, must remain on the premises where they were seized or taken possession of, and cannot be removed or sold until after the expiration of five clear days from the day they were so seized or taken possession of.

This gives the grantor time to make the above application.

Every bill of sale must be duly attested and registered, otherwise it is void in respect of the chattels comprised therein (sect. 8).

The execution of a bill of sale by the grantor must be attested by one or more credible witness or witnesses, not being a party or parties thereto. So much of sect. 10 of the 41 & 42 Vict. c. 31, as requires such execution to be attested by a solicitor of the Supreme Court, and the attestation to state that before such execution the effect of the bill of sale was explained to the grantor by the attesting witness, is repealed.(*a*)

(*a*) 45 & 46 Vict. c. 43, s. 10.

Every bill of sale must be duly registered, otherwise it is void in respect of the personal chattels comprised therein.(*a*) For the purpose of registration there must be made a copy of the bill of sale and of every schedule or inventory thereto, and of every attestation of the execution thereof, together with an affidavit of the time the bill of sale was made, and of its due execution and attestation, and a description of the residence and occupation of the person making it (or if made while under process, then a description of the residence and occupation of the person against whom process issued), and of every attesting witness to the bill of sale; and these documents, and the original bill of sale duly stamped (*b*), must be filed with the registrar at the central office within seven clear days after the execution of the bill of sale, or if executed out of England, within seven clear days after the time at which it would in the ordinary course of post arrive in England if posted immediately after the execution thereof.(*c*)

If the bill of sale is made subject to any defeasance or condition, &c., not contained in the body thereof, such defeasance or condition, &c., is to be deemed part of the bill, and must be written on the same paper or parchment therewith before registration, and be truly set forth in the copy filed, otherwise the registration is to be void.(*d*)

This registration must be repeated every five years, otherwise it becomes void. The renewal of registration is effected by filing with the registrar an affidavit stating the date of the bill of sale and the date of the last registration thereof, and the names, residences, and occupations of the parties thereto as stated therein, and that the bill of sale is still a subsisting security.(*e*)

Where the affidavit accompanying the bill of sale on registration states the residence of the person giving it, or against whom process issued, to be in some place outside the London

(*a*) 45 & 46 Vict. c. 43, s. 8. (*b*) 33 & 34 Vict. c. 97, s. 57.
(*c*) See 41 & 42 Vict. c. 31, s. 10 (2); 45 & 46 Vict. c. 43, s. 8.
(*d*) 41 & 42 Vict. c. 31, s. 10, sub-s. 3.
(*e*) 41 & 42 Vict. c. 31, s. 11.

bankruptcy district, or where the bill of sale describes the chattels enumerated therein to be in some place outside such district, the registrar must, within three clear days after registration in the principal registry, transmit an abstract of the contents of the bill of sale to the county court registrar in whose district such places are situate.(*a*)

A judge of the High Court has power to extend the time for registration, &c., when the omission to register, &c., was accidental or due to inadvertence, &c., and may impose terms.(*b*)

Provision is made by the 45 & 46 Vict. c. 43, s. 16, for searching the register for bills of sale, on payment of a fee of one shilling, and on like payment of a fee of one shilling for inspecting and for taking extracts therefrom, limited to the dates of execution, registration, renewal of registration and satisfaction of registered bills of sale, and to the names, addresses, and occupations of the parties, the amount of consideration, and to any further prescribed particulars; and by Order 60 b (1882) search and inspection may be made in the County Court, and extracts taken.

A bill of sale is to be no protection in respect of personal chattels included therein if liable to distress under a warrant for the recovery of taxes and poor and other parochial rates.(*c*)

The following documents do not come within the definition "bill of sale," within the Bill of Sales Act, 1878, namely, assignments for the benefit of creditors; marriage settlements;(*d*) transfers of ships, or any shares therein; transfers of goods in the ordinary course of business in a trade; bills of sale of goods in foreign parts or at sea; bills of lading; India warrants; warehouse keepers' certificates; warrants or orders for the delivery of goods, or any other documents

(*a*) 45 & 46 Vict. c. 43, s. 11; and see Ord. 60 b (1882).
(*b*) 41 & 42 Vict. c. 31, s. 14.
(*c*) 45 & 46 Vict. c. 43, s. 14.
(*d*) This means ante-nuptial settlements only: (*Fowler* v. *Foster*, 28 L. J. Q. B. 210.)

used in the ordinary course of business as proof of the possession or control of goods, or authorising either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented.(*a*)

And the 45 & 46 Vict. c. 43, s. 17, enacts that nothing therein is to apply to debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company.

Sect. 8 of the 41 & 42 Vict. c. 31, after providing that a bill of sale is to be duly attested and registered within seven days from the making thereof, and is to set forth the consideration thereof, enacts that otherwise the bill is to be void against trustees or assignees of the grantor under bankruptcy or liquidation, or under an assignment for the benefit of his creditors, or against sheriffs' officers under an execution of the process of any court. This section is by sect. 15 of 45 & 46 Vict. c. 43, repealed.

It will be noticed that the 41 & 42 Vict. c. 31, s. 8, enacts that if the bill of sale is not duly registered and attested, and does not set forth the consideration for the bill of sale, it is void as against certain specified persons, of whom the grantor is not one. Therefore the bill of sale, though not attested and registered under this Act, is good as between grantor and grantee.(*b*) Whereas the 45 & 46 Vict. c. 43, s. 8, enacts that if the bill of sale be not duly attested and registered, and does not truly set forth the consideration for which it was given, "such bill of sale shall be void in *respect of the personal chattels comprised therein.*"

It would seem, therefore, that the object of this section is to make the bill void against all persons unless the conditions of the Act are complied with.

Sect. 15 of 45 & 46 Vict. c. 43, also repeals sect. 20 of 41 & 42 Vict. c. 31, which latter section enacts that chattels

(*a*) 41 & 42 Vict. c. 31, s. 4.
(*b*) *Davis* v. *Goodman*, 5 C. P. Div. 128; 49 L. J. C. P. 344 28 W. R. 559.

comprised in a bill of sale duly registered are not to be deemed to be in the possession, order, or disposition of the grantor thereof within the meaning of the Bankruptcy Act, 1869.

Before this enactment it had been decided that, notwithstanding the registration of a bill of sale, if the goods comprised therein were in the possession, order, and disposition of the assignor, being a trader, at the time of his bankruptcy, the trustees under the bankruptcy were entitled to them. (*a*)

And now, as before shown, the grantee of chattels assigned under a bill of sale may seize such chattels if the grantor become a bankrupt, &c. (*b*)

OF THE ASSIGNMENT OF MORTGAGES.

A mortgage is assignable, and the concurrence of the mortgagor in the transfer is not actually necessary; but it would not be advisable to accept a transfer without the concurrence of the mortgagor, for independently of the danger of forgery, an assignee will take subject to the real state of the account between the mortgagor and mortgagee, and therefore he should be well satisfied that the account is correct if he dispense with the mortgagor's concurrence. (*c*)

A mortgagee alone cannot increase the principal by making the interest principal; but an assignee is entitled to the whole sum due, although he buys it at a less price. (*d*)

If a transfer should be taken without the consent of the mortgagor, the solicitor for the transferee should inquire of the mortgagor if the whole debt is still due, or if he has paid off any portion of the debt. And as soon as the transfer is complete notice of it should be given to the mortgagor, so as

(*a*) *Re Long*, 31 L. T. 270; *Badger* v. *Shaw*, 1 L. T., N. S. 323; *Ex parte Watkins, re Couston*, 8 Ch. App. 520.

(*b*) 45 & 46 Vict. c. 43, s. 7 (2).

(*c*) Lord St. Leonards' Handy Book, 100; 1 Prid. Conv. 495, 11th ed.

(*d*) Lord St. Leonards' Handy Book, 100; Coote Mortg. 303; 3rd ed.

to prevent any payments by him to the mortgagee on account of the mortgage debt, as well as to complete the transfer and enable the assignee to sue for the debt in his own name.(*a*)

As to the several parts of a deed of transfer of a mortgage, if one of the forms given by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), be not adopted, they are, the mortgagor concurring, the date and parties (being the mortgagee of the first part, the mortgagor of the second part, and the transferee of the third part), a recital that the principal money is still due, but that all interest has been paid, and a recital of the agreement for the transfer. Then comes the first testatum, where, in consideration of the money paid, the transferor, as mortgagee, assigns the mortgage debt, and the benefit of all powers and securities for payment to the transferee, and the first habendum. Next the second testatum, whereby the transferor as mortgagee conveys, and the mortgagor as beneficial owner conveys and confirms (*b*) the mortgage premises to the transferee, subject to the subsisting equity of redemption, and the habendum; also a covenant by the mortgagor to pay principal and interest. (*c*)

Formerly the mortgagee covenanted merely that he had done no act to incumber the property. By the 44 & 45 Vict. c. 41, s. 7, sub-s. 1 (F) it is provided that in a conveyance by a person who conveys and is expressed to convey as mortgagee, a covenant extending to such person's own acts only is implied to the effect that the person so conveying has not executed, or done, or knowingly suffered, or been party or privy to any deed or thing, whereby the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected,

(*a*) 36 & 37 Vict. c. 66, s. 25, sub-s. 6.

(*b*) If the debt be secured on leaseholds for years, the second testatum and habendum will require to be altered to meet the different tenure of the property.

(*c*) See forms, 1 Prid. Conv. 630, 11th ed.; Wolstenholme and Turner's Conv. Act, 172, and see note (*a*) p. 174, where it is stated that it is not necessary to imply a covenant by the mortgagor, as his covenant is contained in the principal mortgage deed.

or incumbered in title, estate, or otherwise, or whereby such person is in anywise hindered from so conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed.

It was also the practice formerly to insert in the deed of transfer a power of attorney to sue for the mortgage debt in the name of the mortgagee, as the debt, being a *chose in action*, was not assignable at law. By the 36 & 37 Vict. c. 66, s. 25, sub-s. 6, it is, however, provided that an absolute assignment in writing signed by the assignor of a debt or legal *chose in action* shall, subject to all equities formerly entitled to priority over the rights of the assignee, pass and transfer to the assignee the legal right to the debt or *chose in action* and all remedies for the same, and power to give a good discharge for the same, without the concurrence of the assignor, from the time that express notice in writing is given to the debtor or person liable to the assignor.

By the 44 & 45 Vict. c. 41, s. 27, a transfer of a statutory mortgage may be made by a deed expressed to be made by way of statutory transfer of mortgage, being in one of the forms given in part 2 of schedule 3 of the Act, with such variations and additions, if any, as circumstances may require.

In whichever of the forms the deed of transfer is made, it is to have effect as follows:

(1.) There becomes vested in the transferee (which term includes his executors, administrators, and assigns) the right to demand, sue for, recover and give receipts for the mortgage money, or the unpaid part thereof, and the interest then due, if any, and to become due, and the benefit of all securities for the same, and the benefit of and the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee.

(2.) All the estate and interest, subject to redemption, of the mortgagee, in the mortgaged land, is to vest in the transferee.

(3.) If the deed of transfer is made in form B. (given by

the Act), where a person is expressed to join therein as covenantor, there is implied a covenant with the transferee, that the covenantor will, on the next of the days by the mortgage deed fixed for payment of interest, pay to the transferee the stated mortgage money, or so much thereof as then remains unpaid, with interest thereon in the meantime, at the rate stated in the mortgage deed; and will thereafter, as long as the mortgage money, or any part thereof, remains unpaid, pay to the transferee interest thereon, at the same rate, on the successive days, by the mortgage deed fixed for payment of interest (sub-sects. 1-4).

The forms of statutory transfer of a mortgage will, like a statutory mortgage, no doubt, be used in all ordinary cases, and for loans on small properties.

By sect. 28 of 44 & 45 Vict. c. 41, which has already (*ante*, p. 71) been noticed, it is enacted that in a deed of statutory mortgage, or of statutory transfer of mortgage, where more persons than one are expressed to convey as mortgagors, or join as covenantors, the implied covenant on their part is to be deemed to be a joint and several covenant by them; and where there are more mortgagees or more transferees than one, the implied covenant with them is to be deemed to be a covenant with them jointly, unless the sum secured is expressed to be secured to them in shares or distinct sums, in which case the implied covenant with them is to be deemed to be a covenant with each severally in respect to the share or distinct sum secured to him.

OF THE REMEDIES OF A MORTGAGEE.

We have already in previous pages anticipated certain of the powers and remedies given to a mortgagee either by the mortgage deed or by the stat. 44 & 45 Vict. c. 41.

As to remedy by action: the 37 & 38 Vict. c. 57, s. 8, enacts that no action is to be brought to recover any sum of money secured by mortgage, &c., but within twelve years next after a present right to receive the same has accrued to some person capable of giving a discharge for or release of

the same, unless in the meantime some part of the principal or interest has been paid, or some acknowledgment of the right thereto has been given in writing, signed by the person by whom the same is payable, or his agent, to the person entitled thereto, or his agent, in which case no action can be brought but within twelve years after such payment or acknowledgment, or the last of them, if more than one.

A mortgagor may, in an action of ejectment and debt, by a mortgagee, set up as a defence his right to redeem.(*a*) And in an action for foreclosure the court will, if there is a fair prospect of the mortgagor being able to repay the money, enlarge the term for repayment.(*b*)

The 44 & 45 Vict. c. 41, s. 25, sub-s. 1, also enacts that any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption in the alternative.

And by sub-ss. 2 and 4 it is further provided that in any action, whether for foreclosure, redemption, or sale, or for the raising and payment in any manner of mortgage money, the court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, or that the mortgagee or person so interested does not appear in the action, and without allowing any time for redemption, or for payment of the mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, without previously determining the priorities of incumbrancers, and may impose terms, including the deposit in court of a sum, fixed by the court, to meet the expenses of sale and secure the performance of the terms imposed.

But if the action is brought by a person interested in the right of redemption and seeking a sale, the court, on the defendant's application, may direct the plaintiff to give

(*a*) MacIntyre and Evans' Jud. Acts, 5.
(*b*) Lord St. Leonards' Handy Book, 99.

security for costs, and give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendant (sub-sect. 3).

The 15 & 16 Vict. c. 86, s. 48, is repealed and replaced by the above provisions (sect. 6, see also sect. 5.)

The court has power under sect. 25, sub-sect. 2, in an action of redemption, to make an order for sale of mortgaged property on an interlocutory application by the mortgagor, without waiting for the hearing of the action. But the exercise of this power is in the discretion of the court. The sale may be ordered to be made out of court, but the proceeds of the sale will be directed to be brought into court.(*a*)

So the court has power under this section to order a sale of the mortgaged property after a preliminary foreclosure judgment has been given, but before it has become absolute where no opposition is offered.(*b*)

In addition to the remedies by action of ejectment or foreclosure, the mortgagee may proceed to exercise the powers conferred upon him by the 44 & 45 Vict. c. 41, ss. 19 to 24, or reserved to him by the mortgage deed, of which we have fully treated, *ante*, pp. 73-81.

If the mortgagee exercises his power of sale, and the proceeds thereof do not realise enough to repay him his principal and interest, and the costs and charges incidental thereto, he may proceed to sue the mortgagor on his covenant for the balance remaining due.

OF REDEMPTION AND RECONVEYANCE.

A mortgagor is entitled to redeem the mortgaged estate on payment of the principal money, interest and costs due to the mortgagee or his representatives, until this right is lost by lapse of time;(*c*) or by the fraud of the mortgagor, as where he makes a second mortgage of the property, without giving notice to the second mortgagee of the prior charge.(*d*)

(*a*) *Woolley* v. *Colman*, 21 Ch. Div. 169; 46 L. T., N. S. 737.
(*b*) *Union Bank* v. *Ingram*, 46 L. T., N. S. 507; 20 Ch. Div. 463.
(*c*) 37 & 38 Vict. c. 57, s. 7. (*d*) 4 & 5 W. & M. c. 16.

By the 37 & 38 Vict. c. 57, s. 7, it is enacted that, when a mortgagee has obtained possession or the receipt of the rents or profits of any mortgaged property, the mortgagor, or any person claiming through him, must bring an action to redeem the mortgage within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the mortgagor's title, or right to redeem, has been given to him, or to the person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him, and then such action must be brought within twelve years next after such acknowledgment, or the last of them, if more than one was given. If there are several mortgagors, &c., an acknowledgment given to one of them is as effectual as if given to all; but if there are several mortgagees, &c., an acknowledgment signed by one or more of them is only effectual as against the party or parties signing, &c.

By the 44 & 45 Vict. c. 41, s. 15, where a mortgagor is entitled to redeem, he now has power to require the mortgagee, instead of reconveying, and on the terms on which he would be bound to reconvey, to *assign* the mortgage debt, and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee is bound to assign and convey accordingly; unless the mortgagee is, or has been, in possession (sub-sects. 1, 2). The section is retrospective, and cannot be ousted by stipulation to the contrary (sub-sect. 3).

Prior to this enactment it was thought that, *stricto jure*, a mortgagee could not be compelled to *assign* the mortgage debt on redemption, either by the mortgagor or by a stranger, though he was bound to convey the estate.(*a*)

And it was held, on the construction of the above section, that, if there be first and subsequent mortgagees of the same estate, the mortgagor cannot require the first mortgagee to

(*a*) See Coote Mortg. 735, 4th ed.

assign the debt and property to a nominee of his own, under this section, without the consent of the puisne mortgagees. Further, that the "mortgagor entitled to redeem," in the section, means a mortgagor or person claiming under the mortgagor, who has a right to require a reconveyance from the mortgagee; and no other person could take advantage of that section.(*a*)

Since the above decision was given, it is provided by the Conveyancing Act, 1882 (45 & 46 Vict. s. 39), s. 12, that the right of the mortgagor, under sect. 15 of the 44 & 45 Vict. c. 41, to require a mortgagee, instead of reconveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer.

As to the bearing of this enactment upon the decision in *Teevan* v. *Smith*, *supra*, it will be noticed that sect. 15 of 44 & 45 Vict. c. 41 can now be taken advantage of by other persons than the mortgagor or person claiming under him, viz., by each incumbrancer; and by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition by an incumbrancer is to prevail over a requisition by the mortgagor. It is to be regretted that no provision is made by the section for furnishing notices to or by the intermediate incumbrancers.

It will be observed that a mortgagee who is or has been in possession is excluded from the operation of sect. 15 of 44 & 45 Vict. c. 51; for, as stated *ante*, p. 65, a mortgagee in possession is answerable to the mortgagor for the rents and profits; and if he assigns his mortgage without the assent of the mortgagor he is answerable for such rents and

(*a*) *Teevan* v. *Smith*, 20 Ch. Div. 724.

profits after, as well as before, such assignment.(*a*) And a second incumbrancer might go into possession and be ousted by the first mortgagee, which renders it necessary to exclude a mortgagee who has been in possession.(*b*)

By the 44 & 45 Vict. c. 41, s. 16, it is provided that a mortgagor, so long as his right to redeem subsists, shall be entitled from time to time, at reasonable times, on his request and at his cost, and on payment of the mortgagee's costs and expenses, to inspect and make copies, or abstracts of, or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee. This section applies only to mortgages made after 31st Dec., 1881, but is to have effect notwithstanding any stipulation to the contrary (sub-sects. 1, 2).

Prior to this enactment it was laid down that a mortgagee was not bound to produce his mortgage deed, or, indeed, any of the title deeds in his possession, to the mortgagor or any person claiming under him, until payment of the principal and interest due, and his costs, though the application was made *bonâ fide*, only to obtain information with a view to paying off the mortgage.(*c*)

There is a decision of Stuart, V.C., however, to the effect that the mortgagee is bound to produce the mortgage deed itself, though not the title deeds, for that deed is as much evidence of the mortgagor's title to redeem, if it contains such a proviso, as it is of the mortgagor's estate.(*d*)

We have before shown (*ante*, p. 97) that any person entitled to redeem mortgaged property may have a judgment or order for sale instead of redemption; and upon what terms the order will be made.

The 44 & 45 Vict. c. 41, s. 17, further provides that a mortgagor seeking to redeem any one mortgage shall be entitled

(*a*) Coote Mortg. 655, 741, 4th ed.
(*b*) Wolstenholme and Turner's Conv. Acts, 41, n.
(*c*) 2 Spence's Eq. 655.
(*d*) *Patch* v. *Ward*, L. R. 1 Eq. 436; but see *Chichester* v. *Donegal*, L. R. 5 Ch. App. 497.

to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem, unless a contrary intention is expressed in the mortgage deeds, or one of them. The section applies only where the mortgages, or one of them, are or is made after the 31st Dec., 1881.

Prior to this enactment it was held that, if a mortgagor mortgaged one estate to a mortgagee to secure a sum of money, and then mortgaged another estate to the same mortgagee to secure another sum of money, the mortgagor, or the assignee of the equity of redemption, could not, adversely to the mortgagee, redeem one estate without redeeming both; for it was said the mortgagee had the right to consolidate the two mortgages, and to insist on both being paid off together.(*a*) In a more recent case, however, where a mortgagor of one property assigned the equity of redemption, and afterwards mortgaged another property to the same mortgagee, and the assignee of the equity of redemption having brought an action to redeem the first property, the mortgagee claimed to consolidate the mortgages; it was held, however, that the right of the purchaser of the equity of redemption could not be affected by a mortgage made after his purchase, and that he was entitled to redeem the first mortgage without redeeming the second.(*b*)

Now, consolidation of mortgages can only arise under the above section by express contract.(*c*)

The six months' notice of the mortgagor's intention to pay off the mortgage having been given, the solicitor for the mortgagor should, within a reasonable time before its expiration, prepare the draft reconveyance, and forward a fair copy thereof to the solicitor for the mortgagee for his approval. The practice being the same as on a sale or mortgage. An

(*a*) See *Vint* v. *Padgett*, 32 L. T. 66; 1 Giff. 446; *Watts* v. *Symes*, 1 De G. M. & G. 240.
(*b*) *Jennings* v. *Jordan*, L. R. 6 App. Ca. 698; 45 L. T., N. S. 593.
(*c*) Wolstenholme and Turner's Conv. Acts, 43, n.

appointment is arranged to take place at the office of the mortgagee's solicitor to execute the reconveyance, and pay the principal money and any interest that may be due, and the costs and charges of the mortgagee's solicitor. On this being done, the title deeds and deed of reconveyance are given up to the mortgagor.

Formerly, if a mortgagee of an estate in fee simple had died intestate, the mortgaged estate descended to his heir-at-law; equity, however, held him to be a trustee thereof for the personal representatives of the mortgagee, and compelled him to join in a reconveyance of the property without his being entitled to any part of the mortgage money. So, if the mortgagee had devised the mortgaged property, the devisee was bound to reconvey on payment to the legal personal representatives of the mortgagee.(*a*)

By the 37 & 38 Vict. c. 78, s. 4, however, it is enacted that the legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee has been admitted, may, on payment of *all sums* secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption or an assurance upon trust.

It was held that this enactment was confined to the case of payment off and reconveyance, and did not apply to a transfer.(*b*)

By the 44 & 45 Vict. c. 41, s. 30, however, the above enactment is repealed as to cases of death occurring after the 31st Dec., 1881, and in lieu thereof it provides that where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representa-

(*a*) Will. Real Pro. 432, 13th ed.
(*b*) *Re Spradbury's Mortgage*, L. R. 14 Ch. Div. 514.

tive from time to time, in like manner as if the same were a chattel real vesting in them or him; and all the like powers for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and deal with the same, is to belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives for the time being of the deceased are to be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

The words "estate or interest of inheritance in tenements" will bring copyholds within this section. It will also in future be unnecessary and useless to make any devise of trust or mortgage estates.(*a*)

A reconveyance of a statutory mortgage may be made by a deed expressed to be made by way of statutory reconveyance of mortgage, being in the form given in Part 3 of sched. 3 to the 44 & 45 Vict. c. 41, with such variations and additions, if any, as circumstances may require (see sect. 29).

The several parts of such a deed, which will be supplemental to the statutory mortgage, are the date and parties; the testatum, whereby, in consideration of payment of principal and interest due on the mortgage, the receipt being acknowledged, the mortgagee, as mortgagee (*b*), conveys to the mortgagor the premises; the habendum to the use of the mortgagor in fee simple discharged from the principal money and interest, and from all claims and demands under the mortgage deed. Any variations or additions that circumstances require may be inserted.(*c*)

If this form be not used the several parts of a deed of

(*a*) Wolstenholme and Turner's Conv. Acts, 59, n., 60, n.

(*b*) This implies a covenant that the mortgagee has done no act to incumber: (see *ante*, p. 94.)

(*c*) See the form, Sched. 3, pt. 3.

reconveyance would, in ordinary cases, be the date and parties, being the mortgagee of the first part, and the mortgagor of the second part; any recitals that may be deemed necessary follow, as if either the mortgagee or mortgagor be dead; then comes the testatum whereby, in consideration of payment of principal and interest, the receipt of which is acknowledged, the mortgagee, as mortgagee, conveys the mortgaged premises to the mortgagor; habendum to the use of the mortgagor free from the debt, &c.(*a*) The covenant that the mortgagee has done no act to incumber is here implied by the mortgagee being expressed to convey as mortgagee.

The form of statutory reconveyance given by the 44 & 45 Vict. c. 41, is by supplemental deed, but hitherto it has been considered advisable, where circumstances will permit, to have the reconveyance indorsed on the original mortgage deed, for then, when this deed is produced, it necessarily bears evidence of the reconveyance; and otherwise the reconveyance might be lost, and great difficulty experienced in proving its execution, or even that the mortgage debt had been paid.(*b*)

If the mortgaged premises consist of a leasehold interest for years, then, prior to the 8 & 9 Vict. c. 112, it was necessary that the term should be either assigned or surrendered for the purpose of merging the term. However the 8 & 9 Vict. c. 112, enacts that terms becoming satisfied are to cease and determine. So that satisfaction of a mortgage debt will be a satisfaction and determination of the term created to secure its payment. Hence a simple acknowledgment of the receipt of the mortgage money signed by the mortgagee and indorsed on the mortgage deed, would seem to be sufficient in such cases.(*c*)

The costs of an ordinary reconveyance are borne by the

(*a*) See A. form, 1 Prid. Conv. 651, 11th ed.
(*b*) See 2 David. Conv. 828, 3rd ed.
(*c*) See 2 David. Conv. 1335, n., 3rd ed.

mortgagor. But if, in consequence of the death of the mortgagee, any additional expense is thereby occasioned, the representatives of the mortgagee must pay it.

EXONERATION OF CHARGES.

Formerly if an estate in mortgage were devised or allowed to descend, the devisee or heir-at-law was entitled to have the mortgage debt paid off out of the testator's or intestate's personal estate, that estate being primarily liable, the land being only liable to be resorted to if the personal estate should be insufficient for the payment of debts.(*a*) By the 17 & 18 Vict. c. 113, however, it is provided that when any person, after 31st Dec., 1854, dies seised of or entitled to any estate or interest in any land or other hereditaments, which at his death are charged with a mortgage debt, and he has not by his will, deed, or other instrument signified any contrary intention, the heir or devisee of such land or hereditaments is not entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person, but the land or hereditaments so charged are, as between the different persons claiming under the deceased person, primarily liable to the payment of the mortgage debt charged thereon; the rights of the mortgagee are, however, reserved, as also the rights of any person claiming under any deed, will, or other document made before 1st Jan., 1855.

As to when a testator had shown a contrary intention, was open to doubts and to conflicting decisions.(*b*) The 30 & 31 Vict. c. 69, s. 1, after stating that doubts had arisen upon the construction of the 17 & 18 Vict. c. 113, enacts that, in the construction of a will of a person dying after 31st Dec., 1867, a general direction that the debts, or all the debts, of the testator shall be paid out of his personal estate, is not to be deemed to be a declaration of an intention contrary to the

(*a*) Will. Real Pro. 437, 13th ed.

(*b*) *Pembroke* v. *Friend*, 2 L. T., N. S. 742; 1 J. & H. 132; *Stone* v. *Parker*, 1 D. & S. 212; 3 L. T., N. S. 79.

17 & 18 Vict. c. 113, unless such contrary intention be further declared by words expressly, or by necessary implication, referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate.

Sect. 2 enacts that, in the construction of these Acts, the word mortgage is to include a lien for unpaid purchase money upon any lands or hereditaments purchased by a testator.

It was held, on the construction of this section, that it did not apply to the case of a lien for unpaid purchase money upon lands purchased by a person who died *intestate*.(*a*)

It was also held that leaseholds for years were not within these Acts.(*b*)

The 40 & 41 Vict. c. 34, therefore enacts that the 17 & 18 Vict. c. 113, and the 30 & 31 Vict. c. 69, shall, as to any testator or intestate dying after the 31st Dec., 1877, be held to extend to a testator or intestate dying seised, possessed of, or entitled to any land or other hereditaments of whatever tenure, which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase money, and the devisee, or legatee, or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate, unless (in the case of a testator) he shall, within the meaning of the said Acts, have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a change of, or direction for, payment of debts upon or out of residuary, real, and personal estate, or residuary real estate.

(*a*) *Harding* v. *Harding*, L. R. 13 Eq. 493.
(*b*) *Solomon* v. *Solomon*, 33 L. J. Ch. 473; 10 L. T., N. S. 54.

CHAPTER V.

LEASES.

A LEASE may be made either by parol or by writing.

A lease of lands, tenements, or hereditaments, by parol, is binding if the term does not exceed three years from the making thereof, and if the rent reserved amounts at least to two-thirds of the full improved value of the property.(*a*) A lease for a longer period, or at a lower rent than this, must not only be in writing,(*b*) but be by deed.(*c*) And an agreement for a lease of lands, tenements, or hereditaments must be in writing, in accordance with the 4th section of the Statute of Frauds, or no action can be brought thereon.(*d*) But, as before shown, equity would always enforce a parol agreement relating to lands or tenements in cases of part performance, or when the defendant had prevented the agreement from being reduced into writing by fraud, or when he does not insist on the statute as a bar to the suit.(*e*) Admitting a tenant into possession, under a parol agreement, is generally considered sufficient to take the case out of the statute.(*f*) And it has been held that, since the Judicature Acts, a person occupying under an executory agreement for a lease is no longer merely tenant from year to year at law, made such by the payment of rent,(*g*) but that he is to be held in every court as holding on the terms of the agreement.(*h*)

(*a*) 29 Car. 2, c. 3, s. 2.
(*b*) 29 Car. 2, c. 3, s. 1.
(*c*) 8 & 9 Vict. c. 106, s. 3.
(*d*) 29 Car. 2, c. 3, s. 4.
(*e*) See fully, *ante*, pp. 17, 29.
(*f*) *Lester* v. *Foxcroft*, 1 L. C. Eq. 625, 2nd ed.
(*g*) *Richardson* v. *Langridge*, L. C. C. 4.
(*h*) *Walsh* v. *Lonsdale*, 21 Ch. Div. 9.

Specific performance will not, however, be enforced of an agreement for a lease from year to year.(*a*)

Before a lease or an agreement for a lease is granted, the solicitor acting for the lessor should ascertain what estate or interest his client has in the property, for a lease is a sale of the property *pro tanto*. And formerly, under an open contract to grant a lease, the intended lessee might have called for the lessor's title to the freehold, and satisfied himself by an investigation of that title that the lessor had power to grant the proposed lease.(*b*) However, it was not the usual practice for an intended lessee to call for a lessor's title. And the 37 & 38 Vict. c. 78, s. 2, r. 1, enacts that, under a contract to grant or assign a term of years, derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title of the freehold.

It will be seen that the above enactment only protects the title to the *freehold*. Therefore, under an open contract to grant an *underlease*, the right of the immediate lessor to grant such underlease might have been inquired into. The 44 & 45 Vict. c. 41, s. 13, however, enacts that, under a contract made after 31st Dec., 1881, to grant a lease for a term of years, to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion, unless a contrary intention is expressed in the contract.

This section is supplementary to sect. 3, sub-sect. 1, considered *ante*, p. 15, and to the 37 & 38 Vict. c. 78, s. 2, above given.

Again, prior to the 44 & 45 Vict. c. 41, s. 18, if the property had been mortgaged, the mortgagor could not have made a lease of the mortgaged premises that would have been binding on the mortgagee; nor could the mortgagee by lease bind the equity of redemption, unless the mortgage

(*a*) *Clayton* v. *Illingworth*, 10 Hare 451.
(*b*) *Waring* v. *Mackreth*, 11 Ves. 343; *Stranks* v. *St. John*, L. R. 2 C. P. 376.

deed had contained powers of leasing.(a) However, prior to the powers of leasing, given to mortgagors and mortgagees by the 44 & 45 Vict. c. 41, set out *ante*, p. 71, *et seq.*, the 36 & 37 Vict. c. 66, s. 25, sub-s. 5, had provided that a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, may bring actions in regard to the property in his own name only, provided he has not received notice from the mortgagee that he intends to take possession of the property, or to receive the rents thereof, or unless the cause of action arises on a contract made by him jointly with any other person.

Should the tenure of the property it is proposed to let be copyhold, it should be borne in mind that the tenant can only lease it for one year, unless there be a custom of the particular manor in which such property lies to lease it for a longer period, or without a licence from the lord of the manor.(b)

If it is found that the intended lessor is merely tenant for life, it must be remembered that his powers of leasing extend only to his own life, unless a power of leasing be given him by the instrument creating his estate (c), and except under the powers conferred by the 40 & 41 Vict. c. 18 (Settled Estates Act, 1877), and the 45 & 46 Vict. c. 38 (Settled Land Act, 1882). By sect. 46 of the first-named Act it is provided that any person entitled in possession, &c., to any settled estate as tenant for life, or years determinable with a life or lives, or for any greater estate, either in his own right or in right of his wife, unless restrained by the settlement, and also any person entitled in possession, &c., to any unsettled estates as tenant by the curtesy or in dower, or in right of a wife seised in fee, may, without application to the court, lease the estates, except the principal mansion house and demesnes thereof and other lands usually

(a) See *Moss* v. *Gallimore* and *Keech* v. *Hall*, Sm. L. C. vol. i., and notes.
(b) Will. Real Pro. 355, 13th ed.; 40 & 41 Vict. c. 18, s. 56.
(c) Lord St. Leonards' Handy Book, 106.

occupied therewith, for a term not exceeding twenty-one years, to take effect in possession at or within one year from the making thereof; the lease to be by deed, at the best rent obtainable and without fine, the rent to be incident to the immediate reversion, impeachable of waste, and to contain a covenant for payment of rent, and such other usual covenants as the lessor thinks fit, and a condition of re-entry on non-payment of rent for twenty-eight days after it becomes due. The lessee must execute a counterpart of the lease.

And by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), a tenant for life (sect. 6), and each person, who when his estate is in possession has the powers of a tenant for life under this Act, as if he were a tenant for life as defined by this Act (*a*), namely, a tenant in tail, even if restrained by Act of Parliament from barring the entail and the reversion is in the Crown (with certain exceptions); a tenant in fee simple with an executory limitation over; a person entitled to a base fee, although the reversion is in the Crown; a tenant for years determinable on life, or a tenant for the life of another, neither holding merely under a lease at a rent; a tenant for his own or another's life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or gift over, or is subject to a trust for accumulation of income for payment of debts or other purpose; or a tenant in tail after possibility of issue extinct; or a tenant by the curtesy (*b*); or a person entitled to the income of land under a trust for payment thereof to him during his own or any other life (whether subject to expenses of management

(*a*) By the interpretation clause of the Act the tenant for life is the person who is for the time being, under a settlement, beneficially entitled to the possession of settled land for his life. And if there are two or more persons so entitled as tenants in common or as joint tenants, &c., they together constitute the tenant for life. And it is immaterial, for the purposes of this Act, that the settled land or the tenant for life's interest therein is incumbered: (see sect. 2, sub-sect. 5-7.)

(*b*) It will be noticed not a doweress.

or not), or until sale of the land, or forfeiture of his interest therein (sect. 58); may lease the settled land or any part thereof, or any easement or right, &c., over or in relation to the same, except (see sect. 15) the principal mansion house and demesnes thereof and lands usually occupied therewith, unless with the consent of the trustees of the settlement (*a*), or of the court, for any purpose whatever, whether involving waste or not, for any term not exceeding in case of (1) a building lease, ninety-nine years; (2) of a mining lease, sixty years; and (3) of any other lease, twenty-one years (sects. 6, 15, 58).

By sect. 7 every lease must be by deed, and take effect in possession not later than twelve months after its date; and reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out for the benefit of the land, &c.; and must contain a covenant by the lessee for payment of rent, and a condition of re-entry on non-payment thereof within a term therein specified, not exceeding thirty days (sect. 7, sub-sect. 1-3).

A counterpart of every lease must be executed by the lessee, and delivered to the tenant for life; the execution of lease by the tenant for life being sufficient evidence of this (sub-sect. 4).

A statement in, or indorsed on, the lease, signed by the tenant for life, of any matter of fact or of calculation under this Act in relation to the lease, is, in favour of the lessee and those claiming under him, sufficient evidence of the matter stated (sub-sect. 5).

It will be noticed that these powers of leasing are, by this Act, conferred upon the tenant for life, and the other persons above enumerated; whereas the leases specified in the 4th and following sections of the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), must be authorised by the Chancery Division of the High Court, on the petition of the party entitled to apply.

(*a*) See hereon, Settled Land Act Rules, 1882, rr. 2, 4, 9.

However, by the 45 & 46 Vict. c. 38, s. 45, the tenant for life, when intending to make a lease, must give notice thereof to each of the trustees of the settlement, by posting the notice in registered letters, and also give like notice to their solicitor, if such solicitor is known to the tenant for life; such letters being posted not less than one month before making the lease (sub-sect. 1): provided that, at the date of notice given, there are not less than two trustees, unless a contrary intention is expressed in the settlement (sub-sect. 2). But a person dealing in good faith with the tenant for life need not inquire respecting the giving of the notice (sub-sect. 3), and is otherwise protected by the Act (sect. 54).

By sect. 12, the leasing power of a tenant for life also extends to the making of—(1) a lease to give effect to a contract for a lease entered into by his predecessors in title, which, if made by the predecessor, would have been binding on the successors in title; (2) a lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land; and (3) a lease for confirming, as far as may be, a previous void or voidable lease; but the lease, when confirmed, must be such a lease as might, at the date of the original lease, have been lawfully granted.

So by sect. 31, the tenant for life may contract to make any lease, and may vary the terms of the lease, with or without consideration, provided the lease be in conformity with this Act (sub-sect. 1 (iii.). And the contract is binding on and enures for the benefit of the settled land, and may be enforced against and by every successor in title for the time being of the tenant for life; but it may be varied or rescinded by any such successor in like manner, as if made by himself (sub-sect. 2).

And by sect. 14, a tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make such a lease of that land as the tenant for life can by this Act make of freehold land. The licence may fix the annual value whereon fines, fees, or

other customary payments are to be assessed, or the amount of the fines, &c. The licence must be entered on the court rolls of the manor, of which entry the written certificate of the steward is sufficient evidence.(*a*)

The tenant for life may complete the lease, &c., by deed, &c., which, to the extent and in the manner it is intended to and can operate under this Act, is effectual to pass the land conveyed, or the easement or right, &c., created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to (1) estates, interests, and charges having priority to the settlement, and to such as were conveyed or created for securing money actually raised at the date of the deed, if any; and (2) all leases and grants at fee farm rents, or otherwise, and grants of easements, rights of common, &c., for value made, or agreed to be made, before the date of the deed by the tenant for life, or by his predecessors in title, or by any trustees for him or them under the settlement, &c.(*b*)

We have already shown what persons besides a tenant for life have under the Settled Land Act, 1882, the same powers as a tenant for life. The Act also provides that, where a person who in his own right is seized of or entitled in possession to land, is an infant, then for the purposes of this Act the land is settled land, and the infant deemed tenant for life thereof (sect. 59).

And by sect. 60, where a tenant for life, or a person having the powers of a tenant for life, is an infant, the powers of a tenant for life under the Act may be exercised on his behalf by the trustees of the settlement, or if there are none, then by such person, and in such manner as the court, on application by the infant's guardian or next friend, orders.

By sect. 61, where a married woman, who if single would have been tenant for life, &c., is entitled for her separate use,

(*a*) 45 & 46 Vict. c. 38, s. 14.
(*b*) 45 & 46 Vict. c. 38, ss. 20, 55.

or under any statute for her separate property, or as a *feme sole* (*a*), then she, without her husband, has the powers of a tenant for life under this Act. Where she is entitled otherwise, then she and her husband together have the powers of a tenant for life under this Act (sub-sects. 2, 3). And a restraint on anticipation in the settlement does not prevent her exercising any power under this Act (sub-sect. 6).

By sect. 62, where a tenant for life, &c., is a lunatic, so found by inquisition, his committee may, under an order of the Lord Chancellor, &c., exercise the powers of a tenant for life under this Act, in his name and on his behalf. The order may be made on the petition of any person interested in the settled land, or of the lunatic's committee.

It will be noticed the Act does not apply to the case of a lunatic not so found by inquisition.

By sect. 50, the powers under the Act of a tenant for life cannot be assigned or released, and do not pass, either by operation of law or otherwise, to an assignee of a tenant for life, but remain exercisable by the tenant for life, notwithstanding any such assignment of his estate or interest under the settlement (sub-sect. 1). But this is without prejudice to the rights of an assignee for value of the estate or interest of the tenant for life, whose rights cannot be affected without his consent; yet, unless he is actually in possession of the settled land, or part of it, his consent is not requisite for making a lease by the tenant for life, made at the best rent, without fine, and in other respects in conformity with this Act (sub-sect. 3).

An assignment, either before or after this Act, and by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance, is included in this section (sub-sect. 4).

A contract by the tenant for life not to exercise any of his powers under this Act is void (sub-sect. 2). Nor can any provision be inserted in any settlement, will, assurance, or

(*a*) See *ante*, p. 3.

other instrument, executed before or after this Act, prohibiting a tenant for life from exercising any power under this Act by declaration, &c., or by limitation or gift over of the settled land, or by a limitation or gift of other real or personal property, or by the imposition of any condition, or by forfeiture, &c., and all such attempts are to be deemed void (sect. 51, sub-sect. 1). And notwithstanding anything in the settlement, the exercise by the tenant for life of any power under this Act will not occasion a forfeiture (sect. 52). Nothing in the Act is to take away or prejudicially affect any power for the time being subsisting under a settlement, &c., exercisable by the tenant for life, or the trustees with his consent, &c.; unless the settlement conflicts with this Act, for then the Act is to prevail. And additional or larger powers than those conferred by this Act may be given by the settlement (sects. 56, 57).

We shall, in subsequent pages of this chapter, have occasion to again refer to the provisions of the Settled Land Act, 1882, as it applies to leases of settled land; but for the present we must again proceed with the law applicable to leases generally.

A lease contains (1) the date and parties; (2) words of present demise; (3) a description of the property demised; (4) the commencement and duration of the term; (5) the amount of rent or other consideration; and (6) proper covenants; for it will be remembered that no covenants are implied by the 44 & 45 Vict. c. 41, s. 7, on a demise by way of lease at a rent (see sub-sect. 5).

If the lease is preceded by an agreement for a lease, such agreement must, in order to be binding, contain all the terms, the names of the parties, the consideration or rent, a description of the property, and the term or duration of the lease.(*a*)

It is desirable, too, that the agreement should contain a

(*a*) See Lord St. Leonards' Handy Book, 104; Redman and Lyons L. & T. 53 *et seq.*, 2nd ed.

minute of the covenants to be entered into by the tenant; and not merely state that the lease shall contain the "usual covenants," as this practice has led to frequent disputes as to what covenants the tenant is to enter into. For instance, a covenant not to assign without licence has been held not to come within the term usual covenants.(*a*) Nor can a tenant at rack rent be compelled to insure the demised premises without an express stipulation to that effect; although it is otherwise on an agreement to grant a building lease.(*b*)

The agreement should also describe with reasonable certainty the property to be demised, as also any exceptions thereout, or any rights reserved to the lessor: as a right of way over the property, and whether it is a right of way on foot or on horseback, and for cattle and carriages. So if the lessor wishes to reserve a right of sporting it should be expressly stipulated for in the contract. Exceptions are usually of timber, mines, and minerals. These exceptions should be in favour of the landlord, and not of a stranger, and be of part only of the property, and that a lesser part, and must not be of anything which has in express terms been d mised.(*c*)

The term for which the lease is to be granted should be clearly set out, both as to its commencement and duration; and whether it is to be determinable before its regular expiration by effluxion of time, as in the case of a lease for twenty-one years with an option to determine it at the end of the first seven or fourteen years, or as the case may be. If it is merely stated that the lease may be determined at the end of a given number of years, without stating by whom it may be determined, this right would belong to the tenant only.(*d*) A lease may be made to commence either presently or *in futuro*.(*e*).

(*a*) Lord St. Leonards' Handy Book, 105; *Henderson* v. *Hay*, 3 Bro. C. C. 632.
(*b*) Lord St. Leonards' Handy Book, 105, 106.
(*c*) See Redman and Lyon's L. & T. 61, 2nd ed.
(*d*) Lord St. Leonards' Handy Book, 106; *Dann* v. *Sparrier*, 7 Ves. 231, 236, n. (*e*) Will. Real Pro. 395, 13th ed.

The amount of the rent and the times of its payment should also be specified, and, if it is intended that any suspension or abatement of the rent is to take place in case of the total or partial destruction of the premises by fire or other accident, the terms thereof must be specified, for otherwise the tenant would have to pay rent, although the premises were uninhabitable, by reason of fire, even if the landlord had insured the premises and received the insurance money,(*a*) or if the premises are otherwise destroyed.(*b*)

It is advisable and usual to stipulate by whom the rates, taxes, and other outgoings are to be defrayed. In the absence of stipulation to the contrary, certain taxes are payable by the landlord, others by the tenant. The land tax and the landlord's property tax are burdens falling upon the landlord, and the tenant is entitled to deduct them out of the current rent. A contract between landlord and tenant will not exonerate the landlord from his liability to defray the landlord's property tax. The tenant should, however, deduct the amount out of his next payment of rent.(*c*) Poor rates, house duty, rates for watching, lighting, &c., are burdens falling upon the tenant.(*d*)

The agreement should also state by whom the property is to be kept in repair. In the absence of stipulation thereon, a tenant from year to year will be bound to make fair and tenantable repairs, to keep the house wind and water tight, so as to prevent obvious waste or decay of the property; but he is not bound to make substantial or lasting repairs, such as new roofing or the like, nor is he liable for mere wear and tear of the premises.(*e*) If the tenant is to repair the property, and covenants to do so without proper exception, he

(*a*) *Lofts* v. *Dennis*, 1 E. & E. 474; 32 L. T. Rep. 273.
(*b*) *Manchester Bonded Warehouse Company* v. *Carr*, 43 L. T., N. S. 476.
(*c*) See 5 & 6 Vict. c. 35, s. 60, Sched. A., No. 4, r. 9.
(*d*) Redman and Lyon's L. & T. 132, 2nd ed.
(*e*) Arch. L. & T. 198, 200, 2nd ed.; Woodf. L. & T. 493, 10th ed.

will be bound to rebuild if the premises are destroyed by fire,(*a*) or other accident.(*b*)

In the absence of contract, there is no obligation on the part of a landlord to repair the premises demised.(*c*) But, on a tenant agreeing to take a lease of a new house, with covenants to keep it in repair, there is an implied contract on the part of the landlord to finish and deliver the house to the tenant in a complete tenantable state of repair, proper for a house of the character agreed to be demised.(*d*)

In agreements to let dwelling houses, it is usual to stipulate that the tenant shall not carry on any trade.

In agreements for farming leases, in addition to the ordinary covenants and provisions, it is usual to stipulate that the lease shall contain covenants against converting pasture into tillage, to cultivate the land in a husband-like manner, or, according to the custom of the country, not to cut or injure saplings, to stack all the hay and corn on the premises, and use all the manure thereon. These covenants may be varied by particular custom.

Where a lease is to contain a covenant to repair, it will be necessary to insert a power for the landlord to enter to view the state of repair, &c. A power of re-entry must also be inserted for the lessor to enter on the breach of any covenant or condition.

If the agreement is for a building lease, then in addition to the ordinary clauses and provisions, stipulations will be necessary as to the building of the property, the insurance of it, and generally as to the construction of roads, drains, and the like.

If the building lease agreed to be granted is to be made by a tenant for life(*e*) of settled land, under the Settled

(*a*) Story's Eq. s. 101.

(*b*) *The Manchester Bonded Warehouse Company* v. *Carr*, 43 L. T., N. S. 476.

(*c*) Redman and Lyon's L. & T. 105, 2nd ed.

(*d*) *Tildesley* v. *Clarkson*, 6 L. T., N. S. 98; 31 L. J. Ch. 362.

(*e*) Or by any person having the powers of a tenant for life: (see *ante*, p. 111.)

Land Act, 1882 (45 & 46 Vict. c. 38), then, in addition to the regulations as to the lease being by deed, at the best rent, &c. (set out *ante*, p. 112), it is further provided that every such lease is to be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, new or additional buildings, or having improved or repaired, or agreeing to improve or repair buildings, or having executed or agreeing to execute, on the land leased, an improvement authorised by this Act(*a*) for or in connection with building purposes (sect. 8, sub-sect. 1).

A peppercorn, or nominal or other rent less than the rent ultimately payable, may be reserved for the first five years, or any less part of the term (sub-sect. 2).

Where the land is contracted to be leased in lots, the entire amount of rent to be ultimately payable may be apportioned; but so that (1) the annual rent reserved by any lease be not less than ten shillings; and (2) the total amount of the rents reserved on all the leases not less than the total amount of the rents which ought to be reserved in respect of the whole land for the time being leased; and (3) the rent reserved by any lease must not exceed one-fifth part of the full annual value of the land comprised in that lease, with the buildings thereon, when completed (sub-sect. 3).

So when a mining lease is agreed to be granted by a tenant for life (*b*) of settled land, then in addition to the regulations as to the lease being by deed, &c. (see *ante*, p. 112), sect. 9 of the above statute provides that (1) the rent may be made to be ascertainable by or to vary according to the acreage worked, or by or according to the quantities of the mineral or substance gotten, made merchantable, or disposed of in or from the settled land, or any other land, or by or according to any facilities given in that behalf; and (2) a fixed or minimum rent may be made payable with or without power

(*a*) As to improvements authorised by this Act, see sect. 25, *et post*, tit. "Settlements." (*b*) See note, *ante*, p. 111.

for the lessee, if the rent, according to the acreage or quantity, in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent period, free of rent other than the fixed or minimum rent (sub-sect. 1). So the lease may be made partly in consideration of the lessee making an improvement authorised by this Act (*a*) for mining purposes (sub-sect. 2).

Where it is shown to the court either (1) that it is the custom in the district in which any settled land is situate for land therein to be leased or granted for building or mining purposes for a longer term than ninety-nine or sixty years respectively, or on other conditions than those specified in this Act, or in perpetuity; or (2) that it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term or on other conditions than the term and conditions specified in this Act, or except in perpetuity; then the court may, if it thinks fit, authorise generally the tenant for life, &c., to make, from time to time, leases or grants of, or affecting the settled land in that district, for any term, or in perpetuity, at fee farm or other rents, secured by condition of re-entry, or otherwise as may be expressed in the order; or may authorise any such lease or grant to be made by the tenant for life in any particular case (sect. 10.) When the court authorises leases or grants generally, any such lease or grant is not to be ordered to be approved or settled by the judge, except for a special reason; but where a lease or grant is authorised in any particular case, it must be approved by him. (*b*)

Under a mining lease, unless a contrary intention is expressed in the settlement, there must be from time to time set aside as capital money (*c*) arising under this Act, part of the rent, as follows, namely, if the tenant for life is impeachable for waste in respect of minerals, three-fourth parts of

(*a*) See note, *ante*, p. 120.
(*b*) Settled Land Act Rules, Dec. 1882, r. 9; see also rules 2, 4, 7.
(*c*) That is, money arising under this Act, and receivable for the trusts and purposes of the settlement: (see sect. 2, sub-sect. 9.)

the rent, and otherwise one-fourth part thereof, the residue of the rent to go as rents and profits (sect. 11).

By the same Act, on a grant for building purposes or a building lease, the tenant for life may make provision for parts of the settled land to be appropriated and laid out for streets, &c., and for vesting such appropriated parts in trustees, or any company or public body, on trusts, &c., for securing the continued appropriation thereof, and the repair of the streets, &c. A general deed may be executed for effecting these purposes, which may be enrolled in the central office of the Supreme Court (sect. 16).

By sect. 17 a mining lease (or a sale, exchange, or partition) may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, way leaves, or rights of way, rights of water and drainage, and other powers and easements, &c., connected with mining purposes, &c. (sub-sect. 1).

We have already (*ante*, p. 114) stated that the tenant for life may complete the lease by deed, &c.

Where an agreement is entered into to grant a lease of a public-house, and the lessee is to be restricted to take his beer or wine and spirits of the lessor (as where the lessor is a brewer or a wine and spirit merchant) a stipulation to that effect will be necessary.

The covenant entered into by a lessor seized in fee is for quiet enjoyment of the premises by the tenant during the term.

The agreement should show clearly on its face that it is intended to operate as an agreement, and not as an actual lease. In determining whether an instrument is a lease or merely an agreement for a lease, the courts endeavour to give effect to what is the intention of the parties.(*a*)

(*a*) See Lord St. Leonards' Handy Book, 105; Redman and Lyon's L. & T. 54, 2nd ed.

The lease itself is usually prepared by the solicitor for the lessor at the expense of the lessee; or at the joint expense of lessor and lessee.

The draft lease having been prepared, the lessor's solicitor makes a fair copy of it, and forwards the fair copy to the solicitor for the lessee, if one, for his perusal. In acting for the lessee a solicitor should see that the lease contains no clause not in accordance with the agreement that is prejudicial to his client; and if there be no agreement, that the lease contains nothing but the usual clauses, provisos, and covenants on the lessee's part; or, at least, he should point out to the lessee anything that may be objectionable, and take the written instructions of his client thereon.

The draft lease being approved is returned to the solicitor for the lessor, and is then engrossed by him, and the draft and engrossment are sent to the solicitor for the lessee for examination, and when this is done they are returned to the lessor's solicitor, and an appointment is made for completion.

If the lessor wishes the lessee to execute a counterpart of the lease, the cost thereof must be borne by the lessor.(*a*)

On the day appointed for completion the lease is executed by the lessor and lessee, and if any fine is to be given it is now paid, and the lease is handed to the lessee. If, however, there is a counterpart, the lease is executed by the lessor and the counterpart by the lessee; the lease being taken by the lessee and the counterpart by the lessor. As the costs of the lessor's solicitor are paid on the execution of the lease, they should be sent to the lessee's solicitor a sufficient time before the day appointed for completion to enable him to look through them and ascertain that they are correct before they are paid.

The technical parts of a lease for (say) twenty-one years at a rent are:

1. The date and parties.
2. The testatum, containing the consideration and words

(*a*) 2 Platt on Leases, 540.

of present demise; for recitals are seldom used in leases, for even when a lease is granted in pursuance of a power, it is sufficient to refer to the power in the testatum stating that the lessor "in pursuance of a power limited to him by a certain instrument," &c. (giving the date and parties of it), "doth appoint and demise," &c.

3. The parcels; subject to any exceptions and reservations.

4. The habendum, pointing out the duration of the term.

5. The reddendum, specifying the rent payable, and the times of payment. We may here state that if rent be reserved generally during the term, without being reserved to any one in particular, it will accrue to the persons, whomsoever they may be, who are entitled to the immediate reversion expectant on the lease.(*a*)

6. The covenants and provisos to be entered into follow the reddendum. We have already shown what these covenants and provisos should be in each case in previous pages.

By the 44 & 45 Vict. c. 41, the provisions of sect. 7 of this Act as to implied covenants (set out *ante*, pp. 46, 47) do not include a demise by way of lease at a rent, or a customary assurance, other than a deed conferring the right to admittance to copyhold or customary land (sub-sect. 5).

It will be noticed that there are two clauses providing for the payment of the rent—the reddendum clause, and the covenant for payment of the rent. The reason for inserting these two clauses is, because, although the words "yielding and paying" imply a covenant to pay rent, and give an action of debt and a power to distrain, yet this implied covenant does not bind the lessee after he has assigned the lease with the lessor's assent, express or implied; whereas on the express covenant the lessor can bring debt or covenant, and the lessee usually binds his heirs(*b*) thereby, and still continues liable after assignment, even though it was with the lessor's consent. The functions of the reddendum, as before

(*a*) Hughes' Conv. 522; Redman and Lyon's L. & T. 68, 69, 2nd ed.
(*b*) But see *ante*, p. 49, hereon.

mentioned, are to specify the amount, and point out the times and places of payment of the rent, &c.(*a*)

If the lease comprises property in Middlesex or Yorkshire, the lease may require registration. However, leases at rack rent, and leases not exceeding twenty-one years, when the actual possession and occupation go along with the lease, are exempted from the operation of the Registry Acts.(*b*)

A lessee may, unless restrained by covenant or agreement, assign the lease or underlet the property comprised in his lease, which of course causes a change of parties. So the lessor may assign his reversion, or there may be a change of parties by death.

The lessee is, however, liable on his covenants during the whole of the term, notwithstanding any assignment he may make; but he is entitled to an indemnity from his assignee against the rent and covenants contained in the lease.(*c*) So the lessor is liable on his express covenants.

An assignee of the term is liable to the original lessor on all covenants in the lease that run with the land, as it is termed. A covenant is said to run with the land when either the liability to perform it, or the right to take advantage of it, passes to the assignee of the land. Thus, the assignee is liable while the term remains vested in him on the covenants to pay rent, rates, and taxes, and to keep the demised premises in repair, and the like; for these covenants extend to things to be done upon the premises demised, and bind an assignee thereof, although he be not bound by express words. But if the covenant relates to a thing not *in esse* at the time of the demise, as to build a new wall on the premises, it is said the assignee is not liable thereon, unless the lessee has covenanted for himself and his assigns. Further, if the covenant is to do an act merely collateral to the land, and does not

(*a*) Lewis' Conv. 13, 335, &c.; Arch. L. & T. 33, 37, 113, &c., 2nd ed.

(*b*) See Sug. Conc. V. & P. 581.

(*c*) Will. Real Pro. 397, 13th ed.

affect the premises demised in any way, the assignee is not bound by such covenant.(*a*)

But when an assignee assigns over to another his liability ceases as to any future breach. In the same manner the benefit of covenants relating to the land entered into by the lessor will pass to the assignee by force of the privity of estate which exists between them.(*b*)

And not only does the lessee remain liable, as above stated, but his executor is also liable, as such, to the extent of the assets, and formerly even after he had assigned the lease.(*c*) By the 22 & 23 Vict. c. 35, it is provided that an executor or administrator liable as such to the rent and covenants in a lease, or agreement for a lease of his testator or intestate, whose estate is being administered, who has satisfied all such liabilities under the lease, &c., as may have accrued due up to the time of assigning it over to a purchaser, and has set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying it out has not arrived, may distribute the residue of the deceased's personal estate, and is then free from personal liability in respect of any subsequent claim under the said lease or agreement for a lease. The lessor may, however, follow the assets of the deceased in the hands of the persons to whom they have been distributed (sect. 27).

A sub-lessee is not liable to the original lessor under the covenants in the original lease; for between an under-lessee and an original lessor no privity exists either of contract or estate.(*d*)

As before stated the lessor may assign his reversion expectant on the lease; and at common law grantees of the reversion were regarded in the light of strangers, and

(*a*) See *Spencer's case*, 1 Sm. L. C. 67, and notes.
(*b*) Will. Real Pro. 398, 13th ed.
(*c*) Sm. Comp. 804, 4th ed. (*d*) Will. Real Pro. 408, 13th ed.

necessarily exempt from the liabilities of the lessor's covenants, and at the same time deprived of all the immediate benefits which the original grantors themselves enjoyed in respect of them, except the action of debt, or distress. This was remedied by the 32 Hen. 8, c. 34, which placed the assignee of a reversion in the same position as to suing and being sued in respect of covenants running with the land in a lease by deed as the original lessor. (*a*) And by the 4 Anne, c. 16, s. 9, attornment by a tenant to a new landlord is dispensed with.

Further remedies have been provided by the 44 & 45 Vict c. 41, for sect. 10 (*b*) enacts that rent reserved by a lease made after the 31st December, 1881, and the benefit of every covenant or provision therein, having reference to the subject matter of the lease, to be observed and performed by the lessee, and every condition of re-entry and other condition therein, is to be annexed and incident to, and to go with the reversion, or any part of it, immediately expectant on the term granted by the lease, notwithstanding severance of such reversion, and is to be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part of the land leased.

It will be noticed this section speaks of the *benefit* of the covenant being annexed, &c. It, however, gives "the person entitled to the income," that is the beneficial owner, as well as the legal reversioner, the right to sue. (*c*)

And sect. 11 (*d*) enacts that, as to leases made after the above date, the obligation of a covenant entered into by a lessor with reference to the subject matter of a lease, shall, so far as he has power to bind the reversionary estate immediately expectant on the term granted, be annexed and

(*a*) Platt, Covts. 527, *et seq.*; Woodf. L. & T. 232, 11th ed.; Redman and Lyon's L. & T. 248, 2nd ed.
(*b*) See also sect. 58, *et ante*, p. 49.
(*c*) Wolstenholme and Turner's Conv. Acts, 37, n.
(*d*) See also sect. 59, *et ante*, p. 49.

incident to, and go with that reversionary estate, or the several parts thereof, notwithstanding severance thereof, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and so far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

This section annexes the obligation of a covenant to the reversionary estate of the lessor where he has power to bind that estate, &c. It therefore makes legally binding, on the successors in title of a person who grants a lease under a power, all covenants which as against the remainderman the grantor had power to enter into. (*a*)

It was also a rule of the common law that a grantee of part of the reversion could not take advantage of a condition, as if a lease had been of three acres, reserving a rent upon condition, and the reversion of two acres were granted, the rent might be apportioned, but the condition was destroyed, as that was entire, and against common right.(*b*)

By the 22 & 23 Vict. c. 35, s. 3, it is, however, provided that where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent, or other reservation, allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent, &c., as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent, &c., allotted or belonging to him.

This section, it will be noticed, applies to rent only.

The 44 & 45 Vict. s. 45, s. 12, however, further provides that notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land leased,

(*a*) Wolstenholme and Turner's Conv. Acts, 37, n.
(*b*) Will. Real Pro. 401, 13th ed.; Redman and Lyon's L. & T. 252, 2nd ed.

and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land leased, every condition or right of re-entry and other condition in the lease, is to be apportioned and remain annexed to the several parts of the reversionary estate as severed, and to be in force with respect to the term whereon each several part is reversionary, or the term which has not been surrendered, or avoided, or ceased, in like manner as if the land comprised in each several part, or the land as to which the term remains subsisting (as the case may be) had alone originally been comprised in the lease (sub-sect. 1).

This section only applies to leases made after the commencement of this Act (31st Dec. 1881) (sub-sect. 2).

This section provides for the apportionment of every condition in a lease which is in its nature apportionable.(*a*)

As before stated, it was a rule of law that every condition was entire and indivisable; and if the condition had been waived once it was gone for ever. So far as this was applied to the breach of a covenant it was intelligible; but it was also applied to a license to perform an act, which was only prohibited when done *without* license, and here the reason is not very apparent.(*b*)

By the 22 & 23 Vict. c. 35, s. 1, it is, however, provided that where a licence to do an act, which without such licence would create a forfeiture, or give a right to re-enter under a condition or power reserved in a lease, is given to a lessee or his assigns, such licence, unless otherwise expressed, is to extend only to the permission actually given, or to the specific breach of any proviso or covenant, or to the actual assignment, &c., thereby specifically authorised to be done, but not so as to prevent proceedings for any subsequent breach, unless otherwise specified in the license: and all rights under covenants and powers of forfeiture and re-entry

(*a*) Wolstenholme and Turner's Acts, 38, n.

(*b*) See Will. Real Pro. 399, 401, 13th ed.; *Dumpor's case*, Sm. L. C. vol. 2; 1 Smith's Comp. R. P. 79, 5th ed.

contained in the lease and the condition are to remain in full force, and be available against any subsequent breach of covenant, assignment, &c., not specially authorised, &c., by such licence.

By sect. 2 it is enacted that where a lease contains a power or condition of re-entry for doing any specified act without licence, and a license is given to one of several lessees to do an act prohibited to be done without licence; or is given to a lessee or one of several lessees, to do any act as aforesaid in respect of part only of such property, such license is not to operate to destroy the right of re-entry in case of a breach of the covenant or condition by the co-lessees, or by the lessee of the rest of the property.

The 23 & 24 Vict. c. 38, s. 6, also provides that where any actual waiver of the benefit of any covenant or condition in a lease on the part of the lessor, or his heirs, executors, administrators, or assigns, is proved to have taken place in any one particular instance, such actual waiver is not to be assumed or deemed to extend to any instance, or any breach of covenant or condition, other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect appears.

We now come to the law respecting relief against the forfeiture of leases for conditions or covenants broken by the lessee.

If a penalty or forfeiture appears to have been inserted in an instrument merely to secure the performance of some act, or the enjoyment of some right or benefit, equity regards the performance of such act, or the enjoyment of such right or benefit, as the substantial object of the party interested therein; and if a compensation can be made for the non-performance or want of enjoyment thereof, it will relieve against the penalty or forfeiture, by decreeing a compensation in lieu thereof proportionate to the damage sustained.(*a*) Thus, equity relieved against a forfeiture incurred for breach

(*a*) See *Peachy* v. *Somerset*, 2 L. C. Eq. 895, 2nd ed.; Story's Eq. ss. 1314, 1320.

of a covenant to pay rent(*a*), but not against a forfeiture incurred for breach of a covenant not to assign without a licence, or for breach of a covenant to repair, except under very special circumstances (*b*), nor, before the 22 & 23 Vict. c. 35, ss. 4-9 (now repealed), against a forfeiture incurred for the breach of a covenant to insure.(*c*)

The 44 & 45 Vict. c. 41, s. 14, repeals the 22 & 23 Vict. c. 35, ss. 4-9 (see sub-s. 7), and enacts that a right of re-entry or forfeiture, under any proviso or stipulation in a lease, for breach of any covenant or condition therein, is not to be enforced by action or otherwise until the lessor serves on the lessee (*d*) notice specifying the particular breach complained of, and if it is capable of remedy, requiring the lessee to remedy it, and in any case requiring the lessee to make compensation in money for the breach, and the lessee has failed, within a reasonable time, to so remedy the breach, if remediable, and to make reasonable money compensation to the satisfaction of the lessor (sub-sect. 1; and see sect. 67).

If the lessor proceeds to enforce such right of re-entry or forfeiture, the lessee may apply to the court for relief, and the court, having regard to the proceedings and conduct of the parties, &c., may grant or refuse relief as it thinks fit. If relief is granted, terms, as to costs, damages, compensation, penalty, or otherwise, including an injunction to restrain any future breach, may be imposed (sub-sect. 2).

It has been held that this section is not confined to breaches taking place after the Act came into operation, but extends also to breaches committed before the Act, and to proceedings pending when the Act came into operation.(*e*)

An underlease as well as an original lease is included in this section, also a grant at a fee farm rent, or securing a

(*a*) Story's Eq. s. 1315.
(*b*) Story's Eq. s. 1321; *Bamford* v. *Creasy*, 7 L. T., N. S. 187.
(*c*) Story's Eq. s. 1320, &c.
(*d*) This notice must be in writing, and served in the mode pointed out by sect. 67.
(*e*) *Quilter* v. *Mapleson*, 9 Q. B. Div. 672.

rent by condition; and an underlessee as well as an original lessee is included, and the heirs, executors, administrators, and assigns of a lessee; also a grantee under such a grant as above specified, his heirs and assigns; and lessor includes an original or underlessor, and the heirs, executors, administrators, and assigns of a lessor; also a grantor as aforesaid, his heirs and assigns (sub-sect. 3).

The section applies, although the right of re-entry or forfeiture accrues under a proviso or stipulation inserted in the lease in pursuance of the directions of any Act of Parliament (sub-sect. 4).

Prior to this enactment it was a rule that equity would not mitigate a penalty or forfeiture imposed by statute, for to do so was said to be in contravention of the direct expression of the legislative will.(*a*)

For the purposes of sect. 14 a lease limited to continue as long only as the lessee abstains from committing a breach of covenant is to be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach (sub-sect. 5).

This section does not extend, however, to (1) a covenant or condition against assigning or underletting, &c., the land leased; or to a condition for forfeiture on the lessee's bankruptcy, or on the taking in execution his interest; or (2) in case of a mining lease to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine, or the workings thereof (sub-sect. 6). Nor (3) is it to affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent (sub-sect. 8; see also sect. 67; 23 & 24 Vict. c. 126, s. 1).

No precedent formality is necessary on the part of a landlord to take advantage of a proviso for re-entry, except in the case of non-payment of rent. In such a case to create a forfeiture at *common law* there must be a demand by the

(*a*) Story's Eq. s. 1326.

landlord or his agent of the precise rent, and on the precise day, when it is due and payable, before sunset, upon the land, or at the place, if any, appointed for payment. These troublesome formalities were, however, obviated by a properly drawn proviso for re-entry, inserted in the lease.(*a*) And the 15 & 16 Vict. c. 76, s. 210, provides that the landlord may, without any formal demand of rent or re-entry, commence an ejectment when one half year's rent is in arrear, and the landlord has by law the right to re-enter for the non-payment thereof, and when no sufficient distress is to be found on the premises countervailing the arrears then due. But by sect. 212 proceedings are to be stayed on payment before trial of all arrears of rent and of costs.

The acceptance by a tenant of a new lease from his lessor operates as a surrender in law of the unexpired residue of the old term; for the tenant, by accepting the new lease, affirms that his lessor has power to grant it; and the lessor could not do this during the continuance of the old term without the new lease operating as a surrender in law of the old one. But if the new lease be void the old one is void also. It appears to be now settled that the granting of a new lease to another person with the consent of the tenant is an implied surrender of the old term.(*b*)

A surrender of a term of years, not being a surrender by operation of law, or of copyholds, or an interest which might by law have been created without writing, is void at law unless made by deed.(*c*)

By the Settled Land Act 1882 (45 & 46 Vict. c. 38), a tenant for life may accept, with or without consideration, a surrender of any lease of settled land, either of the whole land leased or any part thereof, with or without an exception of the mines and minerals therein, or of mines and minerals. On a surrender of a lease in respect of part only

(*a*) See Redman and Lyon's L. & T. 203, 2nd ed.
(*b*) Will. Real Pro. 409, 410, 13th ed.
(*c*) See 8 & 9 Vict. c. 106, s. 3.

of the land or mines and minerals leased, the rent may be apportioned; and the tenant for life may grant new leases of the property surrendered, or any part of it, or in lots, which may comprise additional land, or mines, or minerals, and may reserve an apportioned or other rent. And the value of the lessee's interest in the surrendered lease may be taken into account in determining the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new lease; which must be in conformity with this Act (sect. 13, sub-sects. 1–6).

And by sect. 31, a tenant for life may accept a surrender of a contract for a lease in like manner and on the like terms in and on which he might accept a surrender of a lease; and may then make a new contract for a lease in like manner and on like terms in and on which he might make a new lease, &c. (sub-sect. 1, iv.). And the contract is binding on and enures for the benefit of the settled land, and may be enforced against and by every successor in title of the tenant for life; but it may be varied or rescinded by the successor in like manner as if made by himself (sub-sect. 2).

Formerly, if a lessee had granted an underlease, and had then surrendered his lease, the underlease would have continued to exist without paying rent to anyone. (*a*) By the 4 Geo. 2, c. 28, s. 6, it is, however, provided that if a lease is surrendered in order to be *renewed*, and a new lease granted, the owner of the new lease is to have the same right to, and remedy for, the rent of under-tenants, as if the original lease had been kept on foot. And the 8 & 9 Vict. c. 106, s. 9, provides that when the reversion expectant on a lease is surrendered or merged, the next vested estate in the property leased, is, for the purpose of preserving the incidents to and obligations on the reversion, to be deemed the reversion expectant on the lease.

Formerly if a tenant for life had leased the lands, not

(*a*) Will. Real Pro. 250, 251, 13th ed.

under a power, and the lessee had sown the land, and then the tenant for life had died before harvest, his tenant would have been entitled to the crop as emblements; by the 14 & 15 Vict. c. 25, however, the tenant is, under such circumstances, to hold over until the expiration of his current year's tenancy, paying rent to the new landlord, instead of taking emblements; no notice to quit being necessary to determine the occupation.

By the Agricultural Holdings Act, 1875 (*a*) provision is made for the compensation of tenants, whose tenancies are within the Act, for improvements made by such tenants. The improvements are divided into three classes: which, as to the first class, are to be considered as exhausted at the end of twenty years; as to the second class, at the end of seven years; and as to the third class, at the end of two years. Provision is also made for charging the holding with the repayment of the amount paid by the landlord.

As to fixtures: It is a general rule that as between landlord and tenant the latter may take away such fixtures as he has himself put up, either for the purposes of trade, ornament, or furniture of his house, if thereby the freehold be not materially damaged. The removal must be made either during the continuance of the term, or at the end of it; for the tenant *cannot remove them after he has quitted the premises.* (*b*)

By the 14 & 15 Vict. c. 25, s. 3, farm buildings, machinery, &c., erected at the tenant's own cost and with his landlord's written consent (and not in pursuance of some obligation) for the purpose of trade or agriculture, may be removed by the tenant, he making good any injury to the premises, if on a month's previous notice in writing of the intention to remove being given to the landlord he does not elect to purchase the same.

(*a*) 38 & 39 Vict. c. 92, amended by 39 & 40 Vict. c. 74.

(*b*) See fully, Arch. L. & T. 352 *et seq.*, 2nd ed.; Redman and Lyon's L. & T. 215 *et seq.*, 2nd ed.

And by the Agriculturals Holding Act, 1875 (38 & 39 Vict. c. 92), s. 53, any engine, machinery, or other fixture, erected by a farm tenant, for which he is not otherwise entitled to compensation, and which is not affixed in pursuance of some obligation, or instead of a landlord's fixture, may be removed by the tenant, he paying all rent, &c., due, not doing any avoidable damage, and making good all damage done, if on a month's previous notice in writing to the landlord of the intention to remove, such landlord does not elect to purchase the fixtures. A steam engine erected without notice to the landlord is excluded, however.

By the common law, if a person having a limited interest in land, as a tenant for life, without a power of leasing, granted a lease and died during a current half year, the whole rent from the last day of payment was lost, because the lease was determined by the lessor's death, and rent was not apportionable in respect of time.(*a*) A remedy by the 11 Geo. 2, c. 22, s. 15, and 4 & 5 Will. 4, c. 22, s. 1, for a proportionate part of the rent, according to the time such tenant for life lived, was given to his executors or administrators. And by sect. 2 of 4 & 5 Will. 4, c. 22, further provision is made for the apportionment of rents, &c., becoming due at fixed periods. It was held, however, that this Act did not apply to an apportionment of rent between the real and personal representatives of a person whose interest was not terminated by his own death or that of another.(*b*) Nor did this statute apply to leases created by parol.(*c*) By the 33 & 34 Vict. c. 35, s. 2, it is, however, provided that all rents and other periodical payments in the nature of income, whether reserved or made payable by an instrument in writing or otherwise, shall, like interest on money lent, be considered as accruing from day to day, and be apportionable in respect of time accordingly.

(*a*) Will. Real Pro. 29, 13th ed.
(*b*) *Browne* v. *Aymott*, 13 L. J. Ch. 232.
(*c*) *Catley* v. *Arnold*, 32 L. T. 369; 7 W. R. 245; *Mills* v. *Trumper*, L. R. 4 Ch. App. 320.

CHAPTER VI.

COPYHOLDS.

COPYHOLD estates are estates held by copy of court roll, and, in construction of law, at the will of the Lord of the Manor of which they form part, according to the custom of the manor. It follows, that in dealing with such estates the custom of the manor must be followed. (*a*)

In sales of copyhold property by public auction the particulars and conditions of sale thereon are similar to those which are used on the sale of freehold property, which have already been considered, allowance being made for the difference of tenure and the custom of the manor in which the property is situate. The mode of conducting the sale is also similar to that which takes place on the sale of freeholds. (*b*)

If the property sold be the freehold interest in enfranchised copyholds, the root of the title will be the deed of enfranchisement, and the purchaser has no right to call for the title to make the enfranchisement. (*c*)

If the copyholds it is proposed to sell lie intermixed with freeholds, there should be a condition to expressly negative the vendor's liability to identify the premises, if this would be at all difficult to do. (*d*)

In preparing an abstract of title to copyholds, the copies of the court rolls of the manor in which the property is situate are abstracted, as also all instruments, facts, and proofs, to show the equitable title. (*e*)

(*a*) See Scriv. Cop. ch. 2. (*b*) See *ante*, tit. "Sales."
(*c*) 44 & 45 Vict. c. 41, s. 3, sub-s. 2.
(*d*) See *Cross* v. *Lawrence*, 9 Hare, 462.
(*e*) 1 Prid. Conv. 140, 11th ed.; Prest. Ab. 202-204.

Where an owner dies seized proof must be given that he did not leave a widow entitled to freebench. And where a conditional surrender has been made to a mortgagee, and he has not been admitted, it should be shown that satisfaction has been entered up. (*a*)

The draft abstract having been prepared, a fair copy of it is made and sent to the purchaser's solicitor for his perusal, as on a sale of freeholds. (*b*)

The purchaser's solicitor after perusing the abstract of title (*c*) attends at the office of the vendor's solicitor, by appointment, to compare the abstract with the copies of the court rolls and other documents set out therein.

Subject to stipulation to the contrary, and to the modifications introduced into the law hereon by the 37 & 38 Vict. c. 78, ss. 1, 2, and the 44 & 45 Vict. c. 41, s. 3, sub-sects. 2, 3, 6 (as to which see *ante*, pp. 20, 37), a vendor of copyholds is bound, at his own expense, to produce to a purchaser the originals, or authenticated copies, of such documents as are comprised in the abstract of title, whether on record or not. (*d*)

The purchaser's solicitor must make an appointment with the steward of the manor in which the copyholds bought are situate, for the purpose of comparing the abstract of title with the court rolls and searching them to see that there are no transactions with the property other than those specified in the abstract, and to ascertain that the dealings with such property have been according to the custom of the manor. (*e*) The steward may, however, refuse to produce the court rolls to a purchaser, for he is a mere stranger to the lord of the manor until admittance; it is not usual to exercise this right, but to permit the purchaser's solicitor to compare the abstract with the court rolls; and in some manors the practice is for the steward to certify the abstract

(*a*) 1 Prid. 140, 11th ed. (*b*) See *ante*, p. 17 *et seq.*
(*c*) As to the mode of doing this see *ante*, p. 33 *et seq.*
(*d*) Scriv. Cop. 406, 6th ed.
(*e*) 1 Prid. Conv. 140, 11th ed.

to be a full and faithful statement of the title as it appears on the records of the manor. (*a*)

This done, any requisitions on the title that may be necessary are next prepared. And the remarks made *ante*, p. 42, as to the mode of preparing requisitions on a purchase of freeholds, apply also to copyholds, subject to the difference in the tenure of the property.

The points raised by the requisitions on the title having been satisfactorily cleared up, and the title approved of, the next step is for the solicitor for the purchaser to prepare the assurance of transfer.

As a rule copyholds on a sale pass by surrender and admittance; that is, the vendor surrenders the property to the lord of the manor to the use of the purchaser, his title being completed by his admittance as tenant of the manor, and payment of the fine due thereon. It has hitherto been the practice to prepare a deed of covenants, of even date with the surrender, containing any recitals that may be necessary, and the usual covenants for title.

By the 44 & 45 Vict. c. 41, s. 2 (v.), however, conveyance, unless a contrary intention appears, is to include a covenant to surrender made by deed, on a sale or mortgage of any property. It would appear, therefore, that if a vendor is expressed to covenant to surrender copyholds as beneficial owner, covenants for title would be implied under sect. 7 of this Act.(*b*)

Mr. Wolstenholme, however, in his notes to sect. 7, states that the Act does not profess to touch customary or copyhold lands except where they can be dealt with as freeholds, as where they pass by deed and admittance, or where an equity is conveyed.(*c*)

The draft surrender(*d*) and deed of covenants having been prepared, fair copies thereof are made and sent to the

(*a*) Scriv. Cop. 406, 6th ed.
(*b*) See 1 Prid. Conv. 231, 11th ed.
(*c*) Wolstenholme and Turner's Conv. Act, 31, n.
(*d*) In some manors the steward prepares the surrender.

solicitor for the vendor for his perusal and approval. After the vendor's solicitor has returned these documents approved to the purchaser's solicitor, he has them engrossed, and they are then sent to the vendor's solicitor for examination with the drafts, and an appointment is made with the steward of the manor to take the surrender.

At the time appointed the parties attend the steward, who takes the surrender, which is usually accompanied by some symbol, as a straw, or a rod, and enters the surrender upon the court rolls of the manor. After the surrender, the purchaser has an equitable interest in the property, which is completed and turned into a legal estate by admittance.(*a*)

In due time the steward informs the purchaser's solicitor that the court copies of the surrender and admittance are ready on payment of his fees, and the fine due to the lord of the manor on the admittance of the purchaser as tenant.

Fines are either fixed, or arbitrary, the amount of the latter being at the will of the lord of the manor. But even when the fine is arbitrary, no more than two years' improved value of the land is allowed to be taken, except under special circumstances.(*b*)

In the absence of stipulation to the contrary, the costs and expenses of the surrender and admittance, as well as the fees and fines due thereon, are payable by the purchaser.(*c*)

As to the mode in which copyhold property is mortgaged, see *ante*, p. 83.

As to the power of leasing copyhold property, see *ante*, pp. 110, 113.

As to the enfranchisement of copyholds, see 15 & 16 Vict. c. 51, and 21 & 22 Vict. c. 94.

(*a*) Will. Real Pro. 375, &c., 13th ed.
(*b*) Scriv. Cop. 219, 220, 223, 5th ed.
(*c*) Sug. Conc. V. & P. 420; Scriv. Cop. 218, 5th ed.

CHAPTER VII.

SETTLEMENTS.

SETTLEMENTS made upon marriage may be either of real or personal property.

The 29 Car. 2, c. 3, s. 4, requires all agreements made upon consideration of marriage to be in writing signed by the party to be charged therewith or his agent before action brought.(*a*)

The settlement is sometimes preceded by articles of agreement for a settlement.

The Settled Land Act, 1882 (45 & 46 Vict. c. 38) contains important provisions affecting the law and practice relating to marriage settlements, to which we shall have occasion to refer from time to time in this chapter.

Sect. 2 of this Act enacts that any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument or instruments made or passed before or after the commencement of this Act (1st January, 1883), under which any *land*, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession is, for purposes of this Act, a settlement (sub-sect. 1).

And an estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor, or descending to the testator's heir, is, for purposes of this Act, an estate or interest coming to the settlor or his heir under the settlement, and comprised in the subject of the settlement (sub-sect. 2).

Land or any estate or interest therein which is the subject of a settlement is, for purposes of this Act, settled land.

(*a*) See hereon, *Randall* v. *Morgan*, 12 Ves. 67; Lord St. Leonards' Handy Book, 114.

And the decision of the question whether land is settled land, for purposes of this Act or not, is governed by the state of facts and the limitations of the settlement at the time of the settlement taking effect (sub-sects. 3, 4).

It will be noticed that sect. 2, sub-sect. 1, of this Act only speaks of settlements of land, or any estate or interest in land. And by sub-sect. 10 of this section land includes incorporeal hereditaments, and an undivided share in land. But, as will be shown in subsequent pages, heir-looms may be dealt with under the Act (sect. 37).

The same Act defines who is a tenant for life; and also specifies who are to have the powers of a tenant for life, which will be found fully detailed *ante*, p. 111, and note thereto.

It will be also necessary here to give the definition of a trustee within this Act.

Sect. 2, sub-sect. 8, provides that the persons, if any, who are for the time being, under a settlement, trustees with a power of sale of settled land, or with power of consent to the exercise of such a power, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act, are for such purposes trustees of the settlement (sub-sect. 8).

It will be necessary to carefully bear in mind this definition, for if the persons appointed trustees do not come within such definition, they will not be able to exercise the powers of this Act applicable to trustees.

Marriage is a valuable consideration; therefore, a settlement made after marriage, if done in pursuance of written articles entered into before marriage, is binding not only between the parties to it, but also against creditors,(*a*) and purchasers and mortgagees for value.(*b*) But a settlement

(*a*) 13 Eliz. c. 5; *Twyne's case*, 1 Sm. L. C. 1; *Barling* v. *Bishop*, 2 L. T., N. S. 651; *Ware* v. *Gardner*, L. R. 7 Eq. 317.

(*b*) 27 Eliz. c. 4; Sug. Conc. V. & P. 566; *Ellison* v. *Ellison*, 1 L. C. Eq. 317, 5th ed.

made after marriage, not in pursuance of written articles entered into before marriage, though good as between the parties to it, is void as against creditors and purchasers and mortgagees for value.(*a*)

Care must, however, be taken to distinguish between a mere voluntary conveyance to a wife and children, and a *purchase* taken in the name of the purchaser's wife and children; the latter of which is not considered to be within the meaning of the 27 Eliz. c. 4, and therefore cannot be defeated by a subsequent *bonâ fide* purchaser for value.(*b*)

And if a person is induced to marry a voluntary grantee on account of the settlement, the voluntary settlement cannot be set aside.(*c*). It has also been held that a covenant by the voluntary grantee to discharge mortgage debts, &c., on the property settled is a sufficient consideration to take the grant out of the 27 Eliz. c. 4.(*d*)

Marriage settlements are usually prepared by the solicitor for the intended wife, and approved of by the solicitor for the intended husband, who also pays the costs thereof. (*e*)

If, on investigating the title to the estate it is intended to settle, it turns out that the property is incumbered, some provision should be made for payment of the incumbrances, otherwise the incumbrancer might enter into the receipt of the rents and profits, and thus defeat the object of the settlement. (*f*)

If the property to be settled consist of large real estates belonging to the intended husband, no doubt they would be strictly settled. The various parts of such a settlement would be the following:—

The date and parties, the intended husband of the first

(*a*) See references, p. 142, note (*b*).
(*b*) Sug. Conc. V. & P. 567; *Re Richardson*; *Weston* v. *Richardson*, 47 L. T., N. S. 514.
(*c*) Sug. Conc. V. & P. 569.
(*d*) *Townsend* v. *Toker*, 1 Ch. App. Ca. 446; *Blake* v. *Blake*, 46 L. T., N. S. 641.
(*e*) *Helps* v. *Clayton*, 11 L. T., N. S. 476; 34 L. J., C. P. 1.
(*f*) Lord St. Leonards' Handy Book, 115

part, the intended wife of the second part, and the trustees of the settlement of the third part.

Any recitals that may be necessary follow. Some conveyancers recite the agreement for the marriage; however, this may be dispensed with, and this fact be briefly stated in the testatum. The interest of the settlor in the property settled is also sometimes recited; so if the settlement is made in pursuance of a power, the instrument creating the power is recited. (*a*)

The testatum and habendum are next set out, the trustees being made joint tenants.

Then come the uses and trusts of the property, which are for the use of the intended husband until the marriage, and after the solemnisation thereof to the use that the trustees, during joint lives of husband and wife, receive a yearly rent-charge for the separate use of the wife for pin money, subject thereto to the use of the husband for life, and after his death to the use of the wife's jointure (*b*), then to the use

(*a*) See forms of these recitals, Wolstenholme and Turner's Conv. Acts, 183.

(*b*) The acceptance by the wife of a competent jointure, whether legal or equitable, before marriage is a bar to her right to dower. However, with regard to women married after the 1st January, 1834, this doctrine is not of much moment. For the 3 & 4 Will. 4, c. 105, places the dower of such women in the power of their husbands; no widow being entitled to dower out of any land which has been absolutely disposed of by the husband in his lifetime, or by his will. And all partial estates, &c., created by the husband, and all his debts, &c., are effectual against the widow's right to dower. The husband may also bar her right to dower, either wholly or partially, by any declaration for that purpose made by him, by any deed, or by his will (sects. 4-7). It should have been stated, *ante*, p. 54, when speaking of purchase deeds, that as a consequence of this statute it has been the practice of many solicitors on a purchase by a client married since the operation of the Act, to insert in the purchase deed a declaration that no widow of the purchaser shall be entitled to dower. This practice is wrong, because if the purchaser does not dispose of the property in his lifetime and dies intestate, there is no reason why the widow's dower should be defeated in favour of the heir-at-law, even if a child, and especially not if a distant relative. (See David. Conc.

of the trustees for a term of one thousand years, to commence from the death of the husband, for raising portions for younger children, and subject thereto to the use of the first and other sons successively in tail male, then to the daughters as tenants in common in tail, with cross remainders between them, the ultimate trusts of the property being for the settlor in fee.

The trusts of the portion term are next declared.

The powers formerly inserted in the settlement were (1) to distrain for the wife's jointure, and to demise the land for a term for the purpose of further securing it; (2) a power for the tenant for life, and after his death for the trustees to lease the settled lands; (3) a power for the trustees to sell the settled lands and repurchase other lands; (4) to exchange the lands for other lands; (5) to concur in making partition of undivided shares of the lands; (6) that the receipts of the trustees should be good discharges for the trust money or any part of it; (7) a power for the settlor to jointure a future wife, and to raise portions for the children of that marriage; and (8) to appoint new trustees of the settlement. A trustees' indemnity clause was added.

It was also the practice to make the settlor enter into the usual covenants for title. (*a*)

Recent legislation has rendered the insertion in settlements of many of the above-named powers unnecessary; for, as to the power to distrain for the wife's jointure, the 44 & 45 Vict. c. 41, s. 44, gives to a person entitled to receive out of land or the income thereof an annual sum, whether charged by way of rentcharge or otherwise, not being rent incident to the reversion, power to enter on the land charged and distrain for the same, and the costs and expenses thereof, if it is unpaid for twenty-one days; and if it

Conv. 116, n, 12th ed.; 1 Prid. Conv. 224, n, 11th ed.) If the client was married on or before 1st January, 1834, and it is wished to prevent the wife's right to dower attaching, the conveyance must be made to the usual dower uses.

(*a*) See 3 David. Conv. 320, 1074.

is unpaid for forty days, such person may enter into possession of the land charged and take the income thereof until the amount due and all costs and expenses are paid (sub-sects. 1-3). A power to limit a term is next given by sub-sect. 4 for further securing the amount payable.

Express powers to this effect, therefore, in settlements seem no longer necessary. (*a*)

As to the power given by the settlement to the tenant for life, and after his death to the trustees thereof, to grant leases of the settled land, and also to enter into preliminary contracts for leases(*b*) and to surrender existing leases. We have shown fully (*ante*, pp. 110 to 116, 119, 121) that by the Settled Land Act, 1882, a tenant for life of settled land, and any person having the powers of a tenant for life, may lease and contract to lease the settled land and accept surrenders of existing leases, in accordance with the provisions of that Act, and that he cannot by the settlement or otherwise be prohibited from so doing. The ordinary powers of leasing formerly inserted in settlements may now, therefore, be omitted.

The powers to sell, exchange, and make partition of settled lands were, by the settlement, usually conferred upon the trustees thereof with the written consent of the tenant for life. The 23 & 24 Vict. c. 146, had provided (in order to shorten settlements), that where a settlement, &c., authorised a sale or exchange, the usual provisions as to the exercise of such a power, and as to the application of the moneys arising from the sale, or received for an equality of exchange, should thereupon be annexed and incident to the power (see sects. 1–10).

These provisions are now repealed by the 45 & 46 Vict. c. 38, s. 64, and schedule.

The 44 & 45 Vict. c. 41, s. 35, however, provides that

(*a*) See 2 Prid. Conv. 304, 11th ed.; Wolstenholme and Turner's Conv. Acts, 72, n.

(*b*) As to where a tenant for life of settled estates agrees to grant a lease thereof under a power and then dies, see *Davis* v. *Harford*, 47 L. T., N. S. 540.

where a trust for sale or a power of sale of property is vested in trustees they may, if a contrary intention is not expressed in the instrument, sell or concur in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or private contract, subject to such conditions of sale as the trustees think fit, with power to vary or rescind any contract for sale, and to buy in and re-sell, without being answerable for any loss (rules 1, 2).

The section only applies to instruments operating after 31st Dec. 1881 (sub-sect. 3).

Sect. 36 of the same Act provides that the receipt in writing of any trustees or trustee for any money, securities, or other personal property or effects, payable, transferable, or deliverable to them or him under any trust or power is to be a sufficient discharge for the same, and to effectually exonerate the person paying, &c., the same from seeing to the application or being answerable for any loss or misapplication thereof.

And by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), the receipt in writing of the trustees of a settlement, or of one trustee, *if one is empowered to act*, or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities paid or transferred to them or him, effectually discharges the payer or transferror therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, &c. (sect. 40).

Under the above sections, which are more comprehensive than previous legislation on this point (*a*), the clause formerly inserted in settlements enabling trustees to give receipts may now be safely omitted.(*b*)

We now come to speak of the provisions of the Settled

(*a*) See 22 & 23 Vict. c. 35, s. 23, and 23 & 24 Vict. c. 145, s. 29, the latter Act being now repealed by the 44 & 45 Vict. c. 41, and the 45 & 46 Vict. c. 38.

(*b*) 2 Prid. Conv. 204, 11th ed.

Land Act, 1882, respecting the powers of sale, exchange, and partition, formerly inserted in settlements of real estate. These provisions may be said, generally speaking, to give to the tenant for life and other limited owners,(*a*) without the consent of the trustees of the settlement, powers which, as we have shown, were formerly vested in the trustees, with the consent of the tenant for life, or in the trustees without such consent; notice to the trustees being now substituted.

By sect. 3 of this Act a tenant for life (1) may sell the settled land, or any part thereof, or any easement, right, or privilege of any kind over or in relation to the same (*b*), except (see sect. 15) the principal mansion house and the demesnes thereof, and other lands usually occupied therewith, unless with the consent of the trustees of the settlement, or an order of the court(*c*); and (2) may exchange the settled land or any part of it for other land, including an exchange in consideration of money paid for equality of exchange; and (3) may concur in making partition of the entirety of undivided shares of settled land, including a partition in consideration of money paid for equality of partition.

The sale must be made at the best price, and the exchange and partition at the best consideration in land, or land and money, that can be reasonably obtained (sect 4, sub-sects. 1, 2).

A sale may be made in one lot or in several lots, either by auction or private contract; and the tenant for life may fix reserve biddings, and buy in. On a sale, exchange, or partition stipulations respecting title, evidence of title, or other things may be made, and any restriction or reservation with respect to building on or other user of the land, or as to

(*a*) See these set out, *ante*, p. 111.

(*b*) When the settlement comprises a manor, this power is extended to the sale of the seignory: (sect. 3 (ii.)

(*c*) The application to the court should be made by summons at chambers, notice whereof must be served upon the trustees: (Settled Land Act Rules, Dec. 1882, rr. 2, 4.)

mines and minerals, &c., may be imposed or reserved by covenant or otherwise, on the tenant for life and the settled land, or on the other party and any land sold or given in exchange or on partition (sect. 4, sub-sects. 3–6).

Settled land in England cannot, however, be given in exchange for settled land out of England (sub-sect. 8).

Where on a sale, exchange, or partition, there is an incumbrance affecting the land sold or given in exchange, or on partition, the tenant for life may, with the consent of the incumbrancer, charge such incumbrance on any other part of the settled land, in exoneration of the part sold or so given, and by conveyance of the fee simple, or other estate subject of the settlement, or otherwise, make provision accordingly (sect. 5).

We have already stated that on or in connection with a sale or grant for building purposes, or a building lease, the tenant for life may appropriate parts of the settled land for streets, &c., to be vested in trustees, &c., for public use (see fully sect. 16, *et ante*, p. 122).

We have also before stated that a sale, exchange, partition, or mining lease may be made either of land, with or without an exception or reservation of mines and minerals therein, or of mines and minerals with or without a grant or reservation of powers of working, wayleaves, and rights, &c., connected with mining purposes, in relation to the settled or any other land (sect. 17, *et ante*, p. 122).

And where money is required for equality of exchange or partition, the tenant for life may raise the same on mortgage of the settled land by conveyance of the fee simple, or other estate the subject of the settlement, or by creation of a term of years therein or otherwise, and the money raised is to be capital money (*a*) arising under this Act (sect. 18).

And the tenant for life may (1) contract to make any sale, exchange, partition, mortgage, or charge, and may (2) vary or rescind, with or without consideration, the contract, in the

(*a*) See note (*c*), *ante*, p. 121.

same manner as he might lawfully do if he were absolute owner of the settled land; but the contract as varied must be in conformity with this Act; and any consideration paid in money is to be capital money arising under this Act. And such contract is binding on and enures for the benefit of the settled land, and may be enforced against and by every successor in title for the time being of the tenant for life; but it may be varied or rescinded by such successor, as if made by himself (see sect. 31, sub-sects. 1, 2).

We have before stated, when treating of the powers of a tenant for life to grant leases under this Act, that he must, when intending to make a lease, give notice thereof to the trustees of the settlement and to their solicitor, if the solicitor is known to the tenant for life; provided that at the date of the notice given the number of trustees be not less than two, unless a contrary intention is expressed in the settlement (see fully *ante*, p. 113). A similar notice must be given when the tenant for life intends to make a sale, exchange, partition, mortgage, or charge; subject to the same proviso (sect. 45).

We have also shown that the tenant for life has full power to complete such lease, sale, exchange, partition, mortgage, or charge, by deed, which is effectual to pass the land conveyed, or the easements, &c., created, discharged from the limitations, &c., of the settlement, and from all estates, &c., subsisting or to arise thereunder, but subject to all estates, &c., having priority to the settlement, and to certain other estates and interests (*a*) which will be found fully detailed *ante*, p. 114.

On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person, dealing in good faith with the tenant for life, is, as against all parties entitled under the settlement, to be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant

(*a*) See 45 & 46 Vict. c. 38, ss. 20, 55.

for life, and to have complied with the requisitions of this Act (sect. 54).

This Act (we are still referring to the Settled Land Act, 1882), by sect. 21 *et seq.*, also provides for the application of the moneys arising from such sale, &c., termed by the Act capital money (*a*) arising under this Act, which, subject to claims properly payable thereout, &c., is, when received, to be invested or applied as follows:

(1.) In investment on Government securities, or on securities on which the trustees of the settlement are authorised by the settlement or by law to invest the trust money, or on the security of the bonds, mortgages, debentures, or debenture stocks of any railway company in Great Britian or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into other such securities.

(2.) In discharge, purchase, or redemption of incumbrances affecting the inheritance, or whole estate settled, or of land tax, rentcharge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land.

(3.) In payment for any improvement authorised by this Act; or (4.) for equality of exchange, or partition of settled land.

(5.) In purchase of the seignory of settled land, being freehold, or of the fee simple of settled land, being copyhold.

(6.) In purchase of the reversion or freehold in fee of the settled land, being leasehold for years, or life (*b*) or years determinable on life.

(7.) In the purchase of land in fee simple, or of copyhold or customary land, or of leaseholds held for sixty years or more unexpired at the time of purchase, subject or not to exceptions or reservations of mines or minerals, or of rights of working them.

(*a*) See note (*c*), *ante*, p. 121.

(*b*) So in the Act, but an estate for life is usually considered a freehold.

(8.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals, convenient to be held or worked with the settled land, or any easement, &c., convenient to be held with such land for mining or other purposes.

(9.) In payment to any person becoming absolutely entitled, or empowered to give an absolute discharge.

(10.) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, &c., of this Act.

(11.) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

In order that this capital money may be invested or applied as above, sect. 22 provides that it shall be paid (1) either to the trustees of the settlement, or (2) into court, at the option of the tenant for life, and be invested or applied accordingly (sub-sect. 1).(*a*) By sect. 39, however, capital money arising under this Act is not to be paid to fewer than two trustees of a settlement, unless the settlement authorises the receipt of capital trust money of the settlement by one trustee (sub-sect. 1).

By sect. 22 the investment or other application by the trustees is to be made according to the direction of the tenant for life, and in default thereof according to that of the trustees, but in the last-mentioned case subject to any con-

(*a*) Any person directed by the tenant for life to pay into court capital money arising under the Act may apply by summons at chambers for leave to do so. The summons must be supported by affidavit setting forth (1) the applicant's name and address; (2) the place where he is to be served with notice; (3) the amount of money to be paid into court, and the account to the credit of which it is to be placed; (4) the name and address of the tenant for life requiring the payment into court; and (5) short particulars of the transaction in respect of which the money is payable: (Settled Land Act Rules, Dec. 1882, r. 10.)

Any person paying into court any capital money arising under the Act is entitled first to deduct the costs of paying the money into court: (*Ib.*, r. 14.)

sent or direction specified by the settlement respecting such investment, &c.; and any investment is to be in the names or under the control of the trustees (sub-sect. 2).

The investment or application under the direction of the court is to be made on the application of the tenant for life or of the trustees (sub-sect. 3).

By the Settled Land Act Rules, Dec. 1882, the order made upon the summons for payment of capital money into court (see note, *ante*, p. 152) may contain directions for investment thereof on any securities authorised by sect. 21, sub-sect. 1, and for payment of the dividends to the tenant for life, either forthwith or upon production of the written consent of the applicant; the signature thereto to be verified by the affidavit of a solicitor. But if the transaction, in respect of which the money arises is not completed at the date of the payment into court, the money is not, without the consent of the applicant, to be ordered to be invested in any securities other than those upon which cash under the control of the court(*a*) may be invested (rule 12).

An investment or application is not to be altered during the life of the tenant for life without his consent (45 & 46 Vict. c. 38, s. 22, sub-sect. 4).

The money, while remaining uninvested or unapplied, and securities on which an investment is made, is, for the purposes of disposition, transmission, or devolution, to be considered as land, and to be held for and go to the same persons successively, in the same manner, and for and for and on the

(*a*) Cash under the control of the court may be invested in Bank Stock, East India Stock, which now includes New East India Stock, Exchequer Bills, and Two-and-a-Half per Cent. Annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales, as well as in Consolidated Three per Cent. Annuities, Reduced Three per Cent. Annuities, and New Three per Cent. Annuities: (see 22 & 23 Vict. c. 35, s. 32; 23 & 24 Vict. c. 38, ss. 10-12; Ord. 1st February, 1861; 30 & 31 Vict. c. 132.)

Money paid into court under the Lands Clauses Consolidation Act is cash under the control of the court, and may be invested in any of the securities sanctioned by the court: (*Ex parte St. John Baptist College, Oxford*, 22 Ch. Div. 93.)

same estates, interests, and trusts as the land rom which the money arises would have been held and gone under the settlement (sub-sect. 5). And the income of the securities is to be applied as the income of such land would have been applicable under the settlement (sub-sect. 6).

Capital money arising under this Act from settled land in England cannot be applied in the purchase of land out of England, unless the settlement expressly authorises the same (sect. 23).

Land acquired by purchase, exchange, or on partition is to be made subject to the settlement thus: (1) freeholds are to be conveyed and be subject to the uses, trusts, powers, and provisions which are subsisting under the settlement, &c., with respect to the settled land, &c., but not so as to increase charges or powers of charging; (2) copyholds or leaseholds are to be conveyed to and vested in the trustees of the settlement on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, to those of the freeholds. The beneficial interest in the leaseholds for years is not, however, to vest absolutely in the person who is by the settlement made by purchase tenant in tail, or in tail male or female, and who dies under twenty-one, but on that event happening it is to go as freehold land conveyed as above mentioned would go (sect. 24, sub-sect. 1-3).

This acquired land may be made a substituted security for a charge in respect of money raised and unpaid from which the settled land was released on such acquisition (sub-sect. 4). And any person who, by the direction of the tenant for life, so conveys the land as to subject it to any charge need not inquire whether the charge is proper (sub-sect. 6).

The provisions of this section also apply, as far as may be, to mines and minerals, easements, and rights, &c. (sub-sect. 7.)

By sect. 33, where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then in addition to such powers of dealing with it as they have independently

of this Act, they may, at the option of the tenant for life, invest or apply it as capital money arising under this Act (see also sect. 32).

And by sect. 34, where capital money arising under this Act is purchase money paid in respect of a lease for years or life, or other interest less than the fee simple, or of a reversion dependent on such lease, &c., the trustees of the settlement, or the court on the application of a party interested in the money, may, notwithstanding anything in this Act, have the same invested, accumulated, or applied in such manner as will give to the parties interested in the money the like benefit therefrom as they might have had from the lease, &c. (sect. 34). If the tenant for life applies to the court under this section, notice of the application must be served upon the trustees (Settled Land Act Rules, Dec. 1882, r. 4).

It has already been stated that capital money arising under this Act may by sect. 21 be applied in payment of any improvements authorised by this Act, which are by sect. 25 defined to be the making or execution on, or in connection with, and for the benefit of, the settled land, of any of the following works or purposes, and works., &c., incident thereto (namely) : (*a*)

Drainage, irrigation, warping, &c.

Embanking or weiring from a river, lake, or sea, or making defences against water.

Inclosing, fencing, reclamation, &c.

Farmhouses, farm and other roads, labourers' cottages, &c.

Saw mills and other mills, &c., reservoirs, tanks, pipes, &c., used for agricultural, manufacturing, or other purposes, &c.

Tramways, railways, canals, docks, piers, &c., for facilitating transport of persons, agricultural stock and produce, manure, and other things required for agricultural purposes, and of minerals and things required for mining purposes.

(*a*) We only give an abridgment of these improvements.

Markets and market places.

Streets, roads, squares, or open spaces for public use, &c., necessary or proper for the conversion of land into building land.

Sewers, drains, fencing, paving, &c., necessary or proper for any of the objects aforesaid.

Trial pits for mines, &c.

Reconstruction or improvement of any of those works.(*a*)

Where the tenant for life desires that capital money arising under this Act shall be applied in payment of any of these improvements, he may submit for approval to the trustees of the settlement or to the court a scheme for the execution of the improvement, showing the proposed expenditure thereon (sect. 26, sub-sect. 1).

If the money is in the hands of trustees they may, after approval of the scheme, apply the money in payment of the improvement made on (1) a certificate of the Land Commissioners(*b*) certifying that the work or a specified part thereof has been properly executed and what amount is payable in respect thereof, which is a conclusive authority and discharge to the trustees for the payment; or (2) on a like certificate of a competent engineer or able practical surveyor nominated by the trustees, and approved by the commissioners or the court, which certificate is to be conclusive as aforesaid; or (3) on an order of the court directing the trustees to so apply a specified portion of capital money (sub-sect. 2).

Where the capital money is in court, then, after a scheme is approved by the court, the court may, on one of the above certificates, approved by the court, or on such other evidence

(*a*) For more full and detailed information as to these improvements, the reader is referred to the Act (45 & 46 Vict. c. 38, s. 25).

(*b*) See sect. 48 of the Act (45 & 46 Vict. c. 38) for the constitution of the Land Commissioners for England. By sect. 49 this certificate must be filed in the office of the Land Commissioners. An office copy thereof may be obtained, which is sufficient evidence of the certificate.

as it thinks sufficient, order that the money be applied in payment of the improvement made (sub-sect. 3).

By sect. 28 the tenant for life and each of his successors in title having, under the settlement, a limited estate only in the settled land, must, during any period prescribed by the Land Commissioners by certificate, maintain and repair at his own expense the improvements executed; and when a building, &c., is comprised in the improvement insure and keep it insured against damage by fire at his own cost, in the amount prescribed in the commissioners' certificate (sub-sect. 1). And he may be required by the commissioners to report to them the state of the improvements, and particulars of the insurance (sub-sect. 3). And if he fails to comply with the above requisites, or does any act in contravention thereof, any person having an estate or interest under the settlement in possession, remainder, or reversion in the settled land, has a right of action against such tenant for life; and his estate after his death is liable in damages for such default or act (sub-sect. 5).

By sect. 29 such tenant for life or successor aforesaid and persons employed by them, have, for the purpose of executing, inspecting, or repairing the improvements, power to enter upon the settled land without being impeachable for waste by the remainderman, and to do all necessary acts, work freestone, limestone, clay, &c., and cut and use timber and trees not planted or left standing for shelter or ornament.

As to timber the Act provides that when a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, he may, with the consent of the trustees of the settlement, or an order of the court, cut and sell such timber. But three-fourth parts of the net proceeds of the sale must be set aside as capital money arising under this Act, and the other fourth part go as rents and profits (sect. 35; see also sect. 28, sub-sect. 2).

Sect. 37 enables the tenant for life, with the consent of the

court, to sell heirlooms which are settled on trust so as to devolve with the land until a tenant in tail by purchase is born, or attains twenty-one, &c. The money arising from the sale is to be capital money arising under this Act, and to be applied accordingly, or invested in the purchase of other chattels of the same or any other nature, to be settled and held on the same trusts, &c., as the chattels sold.

Such are the powers given to a tenant for life or other persons having the powers of a tenant for life to sell, exchange, make partition, mortgage, charge, and improve, &c., settled land, under the Settled Land Act, 1882. The ordinary powers of sale, &c., formerly inserted in settlements of realty may now therefore be omitted.

Provision is also made by the Act for the execution of its powers in case of infancy, coverture, and lunacy, as fully detailed, *ante*, pp. 114, 115.(*a*)

We have also shown that the tenant for life cannot divest himself of the powers given by this Act; that a contract by him not to exercise such powers is void; and that any provision in the settlement, &c., with the object of prohibiting the tenant for life from exercising any power under the Act, is void; and that the exercise of such powers, notwithstanding anything in the settlement, will not occasion a forfeiture: (see sects. 50-52; and fully *ante*, pp. 115, 116.)

But a tenant for life, in exercising any power under this Act, must have regard to the interests of all parties entitled under the settlement, and he is deemed to be in the position and to have the duties and liabilities of a trustee for those parties (sect. 53). And, as before shown, when intending to make a sale, &c., he must give notice thereof to the trustees of the settlement, or to their solicitor.

And where any provision in this Act refers to sale, purchase, exchange, partition, leasing, or other dealing, or to any power, consent, payment, receipt, deed, assurance, contract, &c., the

(*a*) And see *ante*, p. 3, as to the power of an infant or married woman, or lunatic, to convey land.

same is to extend only (unless it is otherwise expressed) to sales, &c., under this Act (sect. 55, sub-sect. 3).

And it will be remembered the Act speaks only of settlements of land, or any estate or interest in land, and of heirlooms.

By sect. 63 provision is made for the case of a settlement of land, or any estate or interest therein, which is subject to a trust or direction for sale, and to a trust to hold the purchase money for the benefit of limited owners entitled in succession, whether absolutely or subject to a trust for accumulation, &c., the land being then deemed to be settled land, and the person entitled to the income being deemed to be tenant for life thereof, and the persons who are trustees for sale, or have a power of consent thereto, or are by the settlement declared to be trustees thereof for purposes of this Act, are for such purposes trustees of the settlement.

It will be seen that concurrent powers of sale may arise under this Act: to the trustees under this section, and to the tenant for life under sect. 3.

Sect. 56 provides that nothing in the Act is to take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, &c., exercisable by a tenant for life, or by trustees with his consent (*a*), or on his request, or otherwise, the powers given by this Act being cumulative (sub-sect. 1). But in case of conflict between the provisions of a settlement and of this Act, relative to any matter in respect whereof the tenant for life exercises, or contracts to exercise, any power under this Act, the provisions of the Act are to prevail; and, notwithstanding anything in the settlement, the consent of the tenant for life is necessary to the exercise by the trustees of the settlement of any power conferred by the settlement exercisable for any purpose provided for in this Act (sub-sect. 2). And if a question arises, or a doubt is entertained, respecting any matter within this

(*a*) For instances of powers to be exercised by consent, see *ante*, p. 146.

section, the decision, opinion, or direction of the court may be obtained thereon (sub-sect. 3).

The settlor may confer on the tenant for life, or on the trustees of the settlement, additional or larger powers than those conferred by this Act (sect. 57); but if given to the trustees they must not conflict with the provisions of the Act, as the Act is to prevail.

Matters within the jurisdiction of the court under the Act are assigned to the Chancery Division of the court (sect. 46, sub-sect. 1). Applications may be made to the court by petition or summons (sub-sect. 3); but if made by petition without the direction of the judge no further costs are to be allowed than would be allowed upon summons: (Settled Land Act Rules, Dec. 1882, r. 2.) On an application by the trustees notice must in the first instance be served on the tenant for life: (45 & 46 Vict. c. 38, s. 46 (4); Settled Land Act Rules, 1882, r. 4.) On any application under the Act it is sufficient to verify by affidavit the title of the tenant for life, and trustees, or other persons interested in the application, unless the judge requires further evidence: (Settled Land Act Rules, Dec. 1882, r. 7.)

By sub-sect. 8 of sect. 46, the Court of Chancery of the county palatine of Lancaster may also exercise the powers of the court as regards land in that county.

Sub-sect. 10 extends the powers of the court as regards land not exceeding in capital value 500*l.*, or 30*l.* in annual rateable value, and as regards capital money arising under this Act and securities and personal chattels settled (see *ante*, p. 156, not exceeding in value 500*l.*, to the County Courts.

As to the power to appoint new trustees, by the 44 & 45 Vict. c. 41, ss. 31 to 34, provision is made for the appointment of new trustees and for the vesting of the trust property; also for the retirement of a trustee.

By sect. 31, where a trustee, either original, substituted, appointed by a court or otherwise, is dead or remains abroad for more than twelve months, or desires to be discharged from the trust, or refuses or is incapable to act therein, then

the person nominated for the purpose by the instrument creating the trust, or, if there is no such person, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, if no contrary intention is expressed in the instrument, if any, creating the trust, by writing appoint a new trustee or trustees in the place of the trustee dead, &c.; and on such appointment the number of trustees may be increased, but this is not obligatory if only one trustee was originally appointed, nor is it necessary to fill up the original number of trustees where more than two were originally appointed. However, except where only one trustee was originally appointed, a trustee is not to be discharged under this section unless there will be at least two trustees to perform the trust. On the appointment of a new trustee any assurance or thing requisite for vesting the trust property jointly in the persons who are the trustees is to be executed or done (sub-sects. 1-4). But, by sect. 34, if a deed appointing a new trustee contains a declaration by the appointor, to the effect that any estate or interest in any land or chattel, or the right to recover and receive any debt, subject to the trust, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, such declaration, without any conveyance or assignment, is to operate to vest in those persons as joint tenants, and for the purposes of the trust, such estate, interest, or right (sub-sect. 1). And where the deed discharging a retiring trustee contains such a declaration as above by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration, without any conveyance or assignment, is to operate to vest in the continuing trustees alone as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates (sub-sect. 2).

The legal estate in copyholds, and land conveyed by way of mortgage for securing money subject to the trust, or shares, stocks or property transferable in books kept by a company

or other body, or in manner prescribed by Act of Parliament, are exempted from the operation of this section (sub-sect. 3).

The effect of sub-sect. 3 is to preserve the rights of lords of copyhold property, to prevent trusts of money appearing on the title of mortgaged property, and to reserve to companies and other bodies the right to require transfers of their stocks or shares to be made in the statutory form. (*a*)

It will be noticed that the appointment of a new trustee under sect. 31 may be made by writing, but the declaration effecting a vesting of property under sect. 34 must be by deed.

It has been held, on the construction of sect. 31, that as this section gives a power to appoint new trustees in every case where a trust is subsisting, it is now improper to apply to the court for the appointment of new trustees under the Trustee Act, 1850, sect. 32, unless there is some reason making it "difficult, inexpedient, or impracticable to appoint them without the assistance of the court," other than the mere absence of a power to do so in the instrument creating the trust. (*b*) But, as will be presently shown, application may be made to the court for the appointment of new trustees under the Settled Land Act, 1882.

By sect. 32 of the 44 & 45 Vict. c. 41, if there are more than two trustees, and one of them by deed declares that he is desirous of being discharged from the trust, and his co-trustees, and any person empowered to appoint trustees, by deed consent to his discharge, and to the vesting in the co-trustees alone of the trust property, and no contrary intention is expressed in the instrument creating the trust, then such trustee is to be deemed to have retired from the trust, and is by the deed to be discharged therefrom without any new trustee being appointed in his place. Any assurance or thing requisite for vesting the trust property in the continuing trustees alone is to be executed or done. This section is retrospective.

Every new trustee appointed under sect. 31, and every

(*a*) See Wolstenholme and Turner's Conv. Acts, 63, note (*c*).
(*b*) *Re John Gibbons' Trust*, 45 L. T., N. S. 756.

trustee appointed by a court of competent jurisdiction, is to have, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust. These sections are retrospective (44 & 45 Vict. c. 41, s. 31 (5); s. 33).

The sections in Lord Cranworth's Act (23 & 24 Vict. c. 145, ss. 27 and 28), which applied to the appointment of new trustees, are repealed by the 44 & 45 Vict. c. 41, s. 71 (1).

The 22 & 23 Vict. c. 35, s. 21, provides that any person may assign personal property, including chattels real, directly to himself and another person or persons, by the like means as he might assign the same to another. And by the 44 & 45 Vict. c. 41, s. 50, freehold land, or a thing in action, may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may in like manner be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person.

This section is intended to apply to a conveyance in joint tenancy as in the ordinary case of the appointment of a new trustee.

Provision is also now made for the release and disclaimer of powers by trustees.

The Conveyancing Act, 1881 (44 & 45 Vict. c. 41) s. 52, enacts that a person to whom any power, whether coupled with an interest or not, is given, may by deed release, or contract not to exercise the power, whether it be created by an instrument coming into operation before or after the commencement of this Act (1st Jan. 1882).

Before this section a power simply collateral, that is, a power given to a person not having any estate in the property over which the power may be exercised, could not have been released.(*a*)

(*a*) Sug. Pow. 47, 49, 8th ed.

This section does not include a disclaimer of such a power. However, by the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 6, it is enacted that a person to whom any power, whether coupled with an interest or not, is given, may by deed disclaim the power; and after disclaimer cannot exercise or join in exercising the power. But the power may be exercised by the other or others, or the survivors or survivor of the others of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power. This applies whether the power be created by an instrument operating before or after the commencement of this Act (1st Jan. 1883).

It must be remembered, however, that by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), a tenant for life of settled land cannot assign, or release, or divest himself of the powers conferred upon him by that Act. (See sects. 50 to 52, *et ante*, pp. 115, 158.)

The 45 & 46 Vict. c. 39, enacts that on an appointment of new trustees a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part thereof; or if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part (sect. 5).

We now come to the section in the Settled Land Act, 1882 (45 & 46 Vict. c. 38), relating to the appointment of new trustees.

Sect. 38 is the one providing for this purpose; and its object seems to be to meet a case where no trustee has ever been appointed, or, at least, for some case not falling within the scope of sect. 31 of the 44 & 45 Vict. c. 41.(*a*)

Sect. 38 provides that if at any time there are no trustees of a settlement within the definition given by this Act (see *ante*, p. 141), or where in any other case it is expedient for purposes of this Act that new trustees of a settlement be appointed, the Chancery Division of the Court may, on the

(*a*) *Re John Gibbons' Trust*, 45 L. T., N. S. 756; *et ante*, p. 162.

application of the tenant for life or any other person having under the settlement an estate or interest in the settled land in possession, remainder or otherwise, or in the case of an infant of his guardian or next friend, appoint fit persons to be trustees under the settlement for purposes of this Act (sub-sect. 1). (*a*)

The persons so appointed, and the survivors and survivor of them, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, are for purposes of this Act the trustees or trustee of the settlement (sub-sect. 2).

Subject to the exception that capital money arising under this Act is not to be paid to fewer than two trustees of a settlement, unless it authorises the receipt of capital trust money by one trustee, the provisions of this Act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee thereof for the time being (sect. 39.)

Prior to 1859 it was the practice to insert in settlements a proviso for indemnity and reimbursement of the trustees thereof. By the 22 & 23 Vict. c. 35, it is provided that every trust instrument is to be deemed to contain a clause to the effect that the trustees thereof be respectively chargeable only for such moneys, securities, &c., as they respectively actually receive, notwithstanding their respectively signing any receipt for conformity, and be answerable only for their own acts, receipts, or defaults, and not for those of each other, nor for any banker, or other person, with whom any trust moneys or securities are deposited, nor for the insufficiency of any stocks or securities, nor for any other loss, unless the same happens through their own wilful default respectively; and that such trustees may reimburse them-

(*a*) Notice of applications under this section must be served upon the trustees, if any, and upon the tenant for life, if not the applicant: (Settled Land Act Rules, Dec. 1882, r. 4.)

selves or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers of the trust instrument (sect. 31).

Since this clause the express introduction into settlements of a proviso for indemnity and reimbursement of trustees may be safely dispensed with. And indeed equity itself always infused such a proviso into trust instruments.(*a*)

Further provision hereon has been made by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), which enacts that each trustee, for the time being, of a settlement is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts, and defaults only, and not for those of any other trustee, or of any banker, or other person, or for the insufficiency of any securities, or for any loss not happening through his own wilful default (sect. 41).

Sect. 42 provides that the trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do; and in case of purchase of land with capital money arising under this Act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, &c., or answerable as regards the price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land if purporting to be in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or for money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease.

By sect. 43 the trustees may reimburse themselves, or

(*a*) Lewin on Trusts, 211, 4th ed.

discharge out of the trust property all expenses properly incurred by them.

If at any time a difference arises between the tenant for life, and the trustees of the settlement respecting any of the powers of this Act, or of any matter relating thereto, the court may, on the application of either party, give directions respecting the matter in difference, and the costs of the application (sect. 44). In the case of applications under this section notice thereof must be served on the tenant for life or on the trustees, as the case may be (Settled Land Act Rules, Dec. 1882, s. 4).

As to extent of the provisions of the Act, the court to which application is to be made, and the mode of making it, see *ante*, pp. 158, 160).

The Settled Land Act, 1882, does not repeal the Settled Estates Act, 1877, with the exception of sect. 17. The latter Act is not, however, compulsory, and it may still be useful in cases not falling within the Settled Land Act, 1882. We therefore propose briefly to notice the sections of the Settled Estates Act which apply to leases and sales of settled land.

By the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), the former statutes, relating to the sale and leasing of settled estates under the sanction of the Chancery Division of the High Court, are repealed and re-enacted by this statute, with certain additions and amendments. The effect of the statute is that leases may be made under the sanction of the court, on due application, for a term not exceeding twenty-one years, for an agricultural or occupation lease; forty years for a mining lease, or a lease of water, &c., or other rights or easements; sixty years for a repairing lease; and ninty-nine years for a building lease, subject to the conditions prescribed in the Act; and where the court is satisfied that it is the custom of the district, and beneficial to the inheritance, to grant leases for longer terms, any of the above leases, except agricultural leases, may be granted for such term as the court directs.(*a*)

(*a*) 40 & 41 Vict. c. 18, s. 4. And as to the leases a tenant for life may make under this Act, see sects. 46, 48, *et ante*, p. 110.

The Act also authorises the court, if the court deems it proper and consistent, with due regard for the interest of all parties entitled, to order a sale of any settled estates. The money raised on any such sale is to be paid either to trustees, of whom the court shall approve, or into court, and is to be applied either to the redemption of the land tax or of any incumbrance affecting the hereditaments sold, or any other hereditaments settled in the same way, or the purchase of other hereditaments to be settled in the same manner, or in the payment to any person becoming absolutely entitled. The money is in the meantime to be invested in some or one of the investments in which cash under the control of the court is for the time being authorised to be invested, and the interest or dividends paid to the tenant for life. But the powers of the Act are not to be exercised if an express declaration to the contrary is contained in the settlement.(*a*)

And by the 44 & 45 Vict. c. 41, s. 41, where a person in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land is to be deemed to be a settled estate within the Settled Estates Act, 1877.

This section enables the court, for the benefit of an infant, to sell his fee simple estate, not only where it comes to him under a settlement, but where he takes it by descent or devise. It also enables the court to authorise leases and sales of the infant's lands of any tenure.(*b*)

By sects. 42 and 43 of the 44 & 45 Vict. c. 41 (Conveyancing Act, 1881), provision is made for the management of the estates of infants and the application of the income thereof.

By sect. 42 power is given to the trustees, as defined in this section, to enter into and continue in possession of the land of an infant, and being a woman is also unmarried. These trustees are to manage the land, with power to fell

(*a*) 40 & 41 Vict. c. 18, ss. 16, 34, 36, 38.
(*b*) See Wolstenholme and Turner's Conv. Acts, 67, n.

timber (*a*) or cut underwood in the usual course for sale, or repairs, or otherwise; and to erect, pull down, and rebuild and repair houses, &c.; to continue the working of mines, &c.,(*b*) which have been worked; to drain and improve the land; to insure against fire; to make arrangements with tenants and others, and to determine tenancies and accept surrenders of leases, and generally to deal with the land in a due course of management, including the payment of expenses and of any annual sum, and the interest of any principal sum charged on the land; but where the infant is impeachable of waste the trustees are to manage so as not to commit waste (sub-sect. 1, 2, 3).

They may also, at discretion, apply any income for the infant's maintenance, education, or benefit, or pay thereout money to the infant's parent or guardian, to be applied for the same purpose (sub-sect. 4).

The trustees are to lay out the residue of the income in investment on securities on which they are, by the settlement, if any, or by law, authorised to invest trust money, with power to vary the investments, and are to accumulate the income of the investments by way of compound interest, by similarly investing such income, and the resulting income, and to stand possessed of the accumulated fund arising from income of the land, and from investments of income on the following trusts:

(1.) If the infant attains the age of twenty-one years, then in trust for the infant.

(2.) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, her receipts, though an infant, to be a good discharge.

(3.) But if the infant dies under age, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase, tenant in

(*a*) It will be noticed the Act only speaks of timber, and not of other trees.

(*b*) It will be noticed no power is given to open new mines.

tail, or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but if no such trusts are declared, or the infant took the land from which the accumulated fund is derived by descent, or the infant is tenant in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate; but the accumulations may at any time be applied as if they were income arising in the then current year (see sub-sect. 5).

Where the infant's estate or interest is an undivided share of land, the powers of this section relative to the land, may be exercised jointly with the persons entitled to possession of, or having power to act in relation to, the other undivided share (sub-sect. 6).

This section only applies to instruments coming into operation after 31st December, 1881, and where no contrary intention is expressed therein (sub-sects. 7, 8).

This section goes beyond what can be done by deed. The trust extends over the minority of a tenant in tail by descent, as well as the minority of a tenant in tail by purchase, which in a deed or will would be a void trust. (*a*)

As to maintenance, by sect. 43 where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently, on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for the infant's maintenance, education, or benefit, the income of the property, whether there is any other fund applicable for that purpose, or any person bound by law to provide for the infant's maintenance or education, or not (sub-sect. 1).

The trustees are to accumulate all the residue of the income in the way of compound interest, by investing the same and the resulting income thereof, from time to time, on

(*a*) See Wolstenholme and Turner's Conv. Acts, 70, n.

such securities as they are, by the settlement, or by law, authorised to invest trust money, and are to hold the accumulations for the benefit of the person who ultimately becomes entitled to the property from which the accumulations arise; but with power at any time to apply the accumulations as if they were current year's income (subsect. 2).

This section applies to instruments coming into operation either before or after the 31st December, 1881, but only so far as a contrary intention is not expressed therein (subsects. 3, 4).

Having regard to this section the maintenance clause which used to be inserted in settlements is no longer essential. The section does not apply, however, where an infant's share is not to vest until the age of twenty-five years. (*a*)

Sect. 43 replaces sect. 26 of 23 & 24 Vict. c. 145 (Lord Cranworth's Act), which is now repealed. (*b*)

The provisions of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), as to the exercise of the powers of that Act in case of infancy, &c., have already (*ante*, pp. 114, 158) been fully considered.

And by the 18 & 19 Vict. c. 43, an infant, upon or in contemplation of marriage, may, with the sanction of the Chancery Division of the High Court obtained on petition, make a binding settlement, or contract for a settlement of all or any part of his or her real or personal estate, or of property over which he or she has any power of appointment. But this Act is not to extend to powers which it is expressly declared, by the instrument creating them, shall not be exercised by an infant. The Act does not apply to male infants under twenty years of age or to female infants under seventeen years of age. And it is provided that if any power of appointment, or any disentailing assurance, be

(*a*) 2 Prid. Conv. 198, 219, n., 461, n., 11th ed.; David. Conc. Conv. 327, n., 12th ed.

(*b*) See Wolstenholme and Turner's Conv. Acts, 71, n.; 44 & 45 Vict. c. 41, s. 71.

executed by an infant tenant in tail under the provisions of this Act, and such infant afterwards dies under age, such appointment or disentailing assurance shall become absolutely void.

The practice of making the settlor enter into covenants for title was inconvenient, and sometimes was followed by results neither desired nor contemplated when they were given.(*a*) And by the 44 & 45 Vict. c. 41, s. 7, sub-sect. 1 (E), in a conveyance by way of settlement a covenant by a person who conveys and is expressed to convey as settlor is implied, to the effect that the person so conveying, and every person deriving title under him by deed, or act, or operation of law, in his lifetime subsequent to that conveyance, or by testamentary disposition, or devolution in law, on his death, will at all times after the date of that conveyance, at the request and cost of the person deriving title thereunder, execute and do all such lawful assurances and things for more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, as may be reasonably required.

There should, therefore, now be either no covenant for title, or at most this limited covenant for further assurance, which binds the settlor to bar an estate tail, or execute a valid appointment under a power, or do any other like act for confirming the settlement, but does not throw on him any obligation to discharge incumbrances.(*b*)

Where a settlement is made after marriage in pursuance of written articles entered into before marriage, the settlement should follow the terms of the articles, as they are looked upon as the binding instrument, and if the settlement differs from the articles in the estates it gives, &c., the settlement will be reformed as between the parties and their representatives, and mere volunteers, but not as against a purchaser for valuable consideration, without notice. Where both the

(*a*) See Wolstenholme and Turner's Conv. Acts, 28, n.
(*b*) See Wolstenholme and Turner's Conv. Acts, 29, n.

articles and the settlement are entered into before marriage, then as a general rule the settlement alone can be looked at, and if it is different from the articles it must be taken as a new agreement. But if it purports to be made in pursuance of the articles, or if there is clear and satisfactory evidence showing that the discrepancy has arisen from a mistake, the court will reform the settlement, and make it conformable to the real intention of the parties.(*a*)

When the eldest son, the first tenant in tail under a settlement of real estates, comes of age during his father's lifetime, and wishes to marry, it will be necessary, before any re-settlement of such estates can be made on the son's marriage, that he and his father, the tenant for life and protector of the settlement, should join in a disentailing assurance, and thus bar the entail, which deed requires enrolment within six months after its execution under the provisions of the 3 & 4 Will. 4, c. 74. This disentailment is, of course, subject to the pin money, jointure, and portions secured by the settlement.(*b*)

Succession duty is payable under settlements. By the 16 & 17 Vict. c. 51, all dispositions or devolutions (with a few exceptions) of property whereby any person becomes beneficially entitled thereto, or to the income thereof upon the death of any person either immediately or after any interval, &c., are deemed to confer upon the person entitled, by reason of such disposition or devolution, a "succession," and the person entitled is termed a "successor," and the settlor, testator, &c., is termed the "predecessor" (sect. 2).

Succession duty therefore attaches upon estates or interests in remainder taken under marriage settlements. The amount of duty payable varies according to the degree of relationship between the predecessor and the successor (sect. 10). But the successions and persons mentioned in sect. 18 are exempt from the payment of succession duty.

(*a*) 2 Spence's Eq. 140, 141; Peachy on Settl. 132.
(*b*) Lord St. Leonards' Handy Book, 116.

Personal property may be the subject of a settlement on marriage, as well as realty. And the remarks made *ante*, p. 142, as to marriage being a valuable consideration, and the power of the courts to set aside voluntary and fraudulent settlements, apply to settlements of personalty.

Personal property belonging to the wife may be vested in trustees upon trust for the husband for life, or until he becomes bankrupt or insolvent, or attempts to assign or charge the same, and upon any of these events, then upon trust for the wife and children of the marriage. But this cannot be done when the property settled is the husband's, as that is considered as a fraud against the bankruptcy law.(*a*)

Where stocks or other effects are settled they are vested in the trustees of the settlement. The formal parts are as follows:

After the date, parties, and recitals, as of the agreement for the marriage, and of the transfer of the stock to the trustees, come the testatum and habendum, and the trusts of the stock or property, which, where it belongs to the husband, usually are upon trust for the husband until the marriage, and after the solemnisation thereof to stand possessed of the stock, with power to vary the same at request of husband and wife or the survivor, upon trust to pay the annual income to the husband for life, then to the wife for life, and after the death of the survivor the stock or property to be in trust for all or any of the children of the marriage as husband and wife shall jointly appoint, and in default of such appointment, as the survivor of husband and wife, and as to the wife, whether covert or sole, shall appoint, and in default of appointment upon trust for the children of the marriage equally, sons taking at twenty-one years of age, and daughters at that age or on their marriage, and if only one child the whole to that one. A proviso follows that if any child has already taken a share by an appointment under the

(*a*) See *Phipps* v. *Lord Ennismore*, 4 Russ. 131; *Lester* v. *Garland*, 5 Sims, 205; and see a form Wolstenholme and Turner's Conv. Acts, 132, No. 11.

power, such child is not to take any part of the unappointed fund without bringing his or her appointed share into hotchpot. A maintenance and advancement clause may be added if it is thought necessary to supplement the powers given by statute 44 & 45 Vict. c. 41, s. 43, as to which see *ante*, p. 170.(*a*)

The ultimate trusts of the stock or capital fund, in default of any child of the marriage becoming entitled, would be for the husband absolutely.

Powers for the trustees to give receipts and to appoint new trustees are no longer necessary, as shown *ante*, p. 147; unless it is wished to nominate a person or persons to appoint new trustees, as the husband and wife or the survivor.(*b*)

Where the wife provides the property brought into settlement, it is usual to give her the first life estate therein for her separate use independently of any husband, and without power of anticipation; and, if the husband survive the wife, upon trust for him for life, or until he attempts to alien or charge the same, or becomes bankrupt or insolvent, &c., and then upon trust for the issue of the marriage as in the husband's settlement; and, in case the wife survives and there are no children, in trust for such persons and purposes as the wife, while not under coverture, by deed, or whether covert or sole, by will appoints; and in default of such appointment in trust for her absolutely; but if she should die in the lifetime of her husband then in trust for the persons who, under the statutes of distributions, would have become entitled in case she had died intestate, such persons, if more than one, to take as tenants in common, &c.(*c*)

By the 37 & 38 Vict. c. 37, an appointment made since this Act in exercise of any power to appoint real or personal property amongst several objects, is good, although one or

(*a*) See a form Wolstenholme and Turner's Conv. Acts, 183 *et seq.*; 2 Prid. Conv. 217 *et seq.*, 11th ed.

(*b*) See David. Conc. Conv. 329, 12th ed.

(*c*) See a form Wolstenholme and Turner's Conv. Acts, 135, No. 15, and notes.

more of the objects of the power is or are altogether excluded; unless the instrument creating the power contains an express declaration as to the amount of the share or shares, from which no object of the power is to be excluded, or that some one or more of the objects of the power shall not be excluded.

If the property brought into settlement by the wife be large, it should be considered whether it would not be advisable to introduce a provision enabling her to settle a portion of her property upon her children by a future marriage, instead of settling the whole of it on the children of the then intended marriage. For if there be only one child of such marriage, and the husband then dies, and the widow marry again, and have a large family, and the whole of her property is settled on the children of the first marriage, this one child will take the whole fund in exclusion of her children by the second marriage. (*a*)

If the property to be settled, or any part of it, consists of money secured on mortgage, the mortgage should, by a distinct deed, be transferred to the trustees of the settlement, with a power for them and the survivor to give receipts for the mortgage money. The settlement will recite this transfer and declare the trusts of the mortgage money. The object of the mortgage being so separately assigned is to prevent the trusts of the settlement being involved in the title to the mortgaged property. (*b*)

Where the property to be settled consists of railway stock, or shares, the stock or shares must first be transferred to the trustees of the settlement by a deed of transfer, which is, however, prepared by the stockbroker, and the transfer must be registered in the books of the railway company. This transfer will be recited in the settlement and the trusts of the stock or shares be therein declared. Railway companies do not recognise any trusts in their books.

(*a*) See a form Wolstenholme and Turner's Conv. Acts, 137, No. 16.

(*b*) Peachy Settl. 837, 841, where a form is given.

The same remarks apply to a settlement of money in the funds.

If a policy of life assurance on the life of the husband is the subject of the settlement, it should, be transferred or assigned to the trustees of the settlement by the deed of settlement itself, and the trusts thereof be thereby declared. The husband should covenant that the policy is valid, that he will keep it on foot, and not do any act to determine it, with a power for the trustees to keep up the policy if the husband makes default in so doing. A power may be given, if thought advisable, for the trustees, with the consent of the husband and wife, to surrender the policy. The trusts of the insurance money received on the death of the husband, would be to invest it and apply the income thereof for the wife for life for her separate use, without power of anticipation, and after her death for the children of the marriage, as previously detailed.(*a*) Notice of the settlement should be given to the insurance company, as directed *ante*, p. 68.

Formerly, when money secured by mortgage, or by bond, or other security not negotiable, was assigned, it was the usual practice to insert in the settlement a power of attorney authorising the trustees to sue for, and recover the moneys due in the name of the assignor; also power to give effectual discharges for the same, and to compound and compromise any such debts, or refer to arbitration any disputes that might arise respecting them.

By the 30 & 31 Vict. c. 144, the assignee of a policy of life assurance may now sue in his own name for the amount due and payable on the death of the assignor, if the assignee has given notice to the insurance company of the date and purport of the assignment.

And by the 36 & 37 Vict. c. 66, s. 25, sub-sect. 6, it is provided that an absolute assignment (not a mere charge) in writing signed by the assignor of a debt or legal *chose in*

(*a*) See Peachy Settl. 854, notes; Wolstenholme and Turner's Conv. Acts, 198; and see 33 & 34 Vict. c. 93, s. 10.

action shall (subject to all equities formerly entitled to priority over the right of the assignee) pass and transfer to the assignee the legal right to the debt or *chose in action*, and all remedies for the same, and power to give a good discharge for the same, without the concurrence of the assignor from the time that express notice in writing is given to the debtor, or person liable to the assignor.

And the 44 & 45 Vict. c. 41, gives to trustees power to compound debts, &c., and allow time for payment, &c. (sect. 37, sub-sects. 2, 3.)

When household furniture is settled it is assigned to the trustees of the settlement by the deed of settlement, and the trusts thereof should be as the wife should appoint, and in default of appointment to the separate use of the wife during the joint lives of husband and wife, independently of her husband or his engagements; and then upon trust for the survivor of husband or wife. A power may be given to the trustees to sell the furniture, with the consent of the wife, and invest the proceeds, and stand possessed thereof upon similar trusts to those of the furniture. Proviso for indemnity of the trustees may be added. (*a*)

The Succession Duties Act (see *ante*, p. 173), and the Infants Settlements Act (*ante*, p. 171), apply to personal as well as to real estate.

The draft settlement having been prepared either by the solicitor for the intended wife, or by counsel from instructions furnished to him by such solicitor, a fair copy of it is made and forwarded to the solicitor for the intended husband for his approval, and if the trustees are represented by a different solicitor to the one acting for the intended wife, his perusal and approval of the settlement on their behalf will be necessary.

The draft settlement having been approved by the solicitors for the different parties, is next engrossed and sent

(*a*) See 2 Prid. Conv. 295, 11th ed.; Key and Elphinstone's Prec. Conv. 1132.

for examination to the solicitors for the other parties, with the fair copy draft settlement, these are returned to the intended wife's solicitor, and an appointment is made for all parties to attend and execute the settlement. The settlement, when executed, is handed over to the trustees.

If the property settled be real estate situate in one of the register counties, the settlement must be duly registered as pointed out *ante*, pp. 35, 58.

And by 44 & 45 Vict. c. 41, s. 34, sub-sect. 4, it is provided that where, by deed, a new trustee is appointed, and trust property vested by declaration therein in a new or continuing trustee (see *ante*, p. 161), then for the purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance be deemed to be made by him or them, under a power conferred by this Act.

This sub-section will make it necessary to search the deeds registry against any person having a power to appoint new trustees, as well as against the trustees.(*a*)

Formerly on the appointment of a new trustee this was usually done by deed indorsed on the settlement;(*b*) but since the 44 & 45 Vict. c. 41, s. 53, deeds expressed to be supplemental, &c., are to be read as if indorsed on the previous deed or contained a full recital thereof.(*c*)

(*a*) Wolstenholme and Turner's Conv. Acts, 64, n. (*d*).
(*b*) David. Conv. vol. 3.
(*c*) See Wolstenholme and Turner's Conv. Acts, 77, n., 199.

CHAPTER VIII.

WILLS.

IN taking instructions for a will a solicitor should ascertain (1) that the testator is of full age, and is otherwise capable of making the testamentary disposition contemplated, as that he is of sound mind; (2) the different species of property the will is to dispose of; (3) the testator's power over the same, as whether it is settled, or incumbered by mortgages, or portions for younger children; and (4) who are to be the objects of the testator's bounty, and in what shares and proportions, &c., they are to take.

Having ascertained these particulars, the solicitor should reduce the instructions for the will into writing, and as a matter of precaution, and to prevent any dispute afterwards arising as to what were the testator's intentions, he may get his client to sign the instructions.

And it is advisable when a testator is *in extremis* that the instructions should, if adequately expressed to convey the testator's intentions, be not only signed by the testator, but duly attested, in order to guard against sudden death, or incapacity before the formal instrument can be prepared and executed.(*a*)

From these instructions the formal will is prepared, either by the solicitor himself, or by counsel acting on such instructions laid before him by the solicitor.

As to the testator's age, the 7 Will. 4 & 1 Vict. c. 26, s. 7(*b*) enacts that no person who is under the age of twenty-one years can make a will.

(*a*) Hayes and Jar. Conc. Wills, 102, 8th ed.

(*b*) This statute will in future pages be cited as the 1 Vict. c. 26 only.

A person who is an idiot, or a lunatic, except during a lucid interval, cannot make a will; nor can any person do so who is mentally imbecile, whether occasioned by great age, drunkenness, or other cause.(*a*)

A person who is born deaf, dumb, and blind, cannot make a will, though blindness or deafness alone will not render a person incapable of doing so.(*b*)

Persons attainted of or outlawed for high treason, petty treason, or felony, could not formerly make a will. Since the 54 Geo. 3, c. 145, it would seem that a felon, except in case of treason or murder, might dispose of an estate in lands to commence after his death. And since the 33 & 34 Vict. c. 23, attainder, escheat, and forfeiture for treason or felony are abolished. Subject, therefore, to the temporary estate of the administrator (sect. 9), and the charges imposed by the Act (sects. 13 to 16), the real and personal property of a traitor or felon remains his own, and he may dispose of it by will; for the prohibition against alienation during the time that he is subject to the Act (sect. 8), can have no application to his will, whensoever executed; a will being no alienation until after the testator's death.(*c*)

However, sect. 1 of the Act provides that it shall not affect forfeiture consequent upon outlawry.

An alien may now make a valid will, as the 33 Vict. c. 14(*d*) provides that real and personal property of every description (except a British ship) may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural born British subject.

Irrespective of legislative enactments, a married woman, if of full age, may make a will of personal property settled to her separate use, or of property over which she has a general power of appointment.(*e*) And it has been held that where

(*a*) Hayes and Jar. Conc. Wills, 68, 8th ed.
(*b*) *Re Francis Owston*, 31 L. J. Pr. 177; 6 L. T., N. S. 368.
(*c*) 1 Jar. Wills, 43, 44, 4th ed.; *et ante*, p. 2.
(*d*) Amended by 33 & 34 Vict. c. 102, and 35 & 36 Vict. c. 39.
(*e*) Hayes and Jar. Conc. Wills, 67, 8th ed.

an estate of inheritance is settled to the separate use of a married woman, without restraint or alienation, she may dispose of it by will.(*a*) But her will made during coverture and disposing of realty only is not entitled to probate, although it appoints executors.(*b*)

She may also by will dispose of goods vested in her as executrix. And, even before the operation of the 45 & 46 Vict. c. 75, the husband might authorise his wife to dispose of her personal estate by will, in the event of her decease in his lifetime. And such a will was valid and binding on the husband if he allowed it to be proved. But during the wife's lifetime, and even after her death until probate of the will, this authority might be revoked. And if the husband should have died before the wife, such a will would not have been binding on the wife's next-of-kin.(*c*)

A married woman was also enabled to make a will if her husband was banished by Act of Parliament, or if he had abjured the realm.(*d*)

And under the 20 & 21 Vict. c. 85, ss. 21, 25, and the 41 Vict. c. 19, s. 4 (Divorce and Matrimonial Causes Acts), a married woman may acquire the status of a *feme sole* with respect to property.

And under the Married Woman's Property Act, 1882 (45 & 46 Vict. c. 75, s. 1), a married woman is capable of acquiring, holding, and disposing by will of any real or personal property as her separate property in the same manner as if she were a *feme sole*, without the intervention of any trustee (sub-sect. 1).

And by sect. 2 of this Act every woman who marries *after* the commencement of this Act is entitled to have and to hold as her separate property, and to dispose by will (sect. 1) of all real and personal property which belongs to her at the time of marriage, or is acquired by or devolves upon her after

(*a*) *Taylor* v. *Meads*, 12 L. T., N. S. 6; 13 W. R. 394.
(*b*) *In the goods of Elizabeth Tomlinson*, 46 L. T., N. S. 484.
(*c*) Will. Per. Pro. 423, 9th ed.; Hayes and Jar. Conc. Wills, 68, 8th ed. (*d*) Hayes and Jar. Conc. Wills, 68, 8th ed.

marriage, including wages, earnings, money, and property gained or acquired by her in any employment or trade in which she is engaged or carries on separately from her husband, &c.

And by sect. 5, every woman married *before* the commencement of this Act is entitled to have, hold, and dispose of by will as her separate property, all real and personal property, her title to which, whether vested or contingent, in possession, reversion, or remainder, accrues *after* the commencement of this Act, including wages, &c., as above detailed.

The execution of a general power by will by a married woman has the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable (sect. 4) under this Act: (see sect. 1, sub-sects. 2-5; sect. 13.)

This Act commences on the 1st January, 1883 (sect. 25.)

A testator may now dispose by his will of all the real and personal estate to which he may be entitled at the time of his death, including copyholds, and contingent, executory, and future interests, although he may have become entitled to the same subsequently to the execution of his will.(*a*)

Every will now speaks from the death of the testator with reference to the real and personal estate comprised in it, unless a contrary intention appears by the will;(*b*) and will therefore pass after-acquired property, if the words of the will are sufficiently comprehensive, but not otherwise, unless the will is re-executed.(*c*) Therefore, where an estate was devised by name, as "all my Quendon Hall Estates in Essex," after-acquired property, although consisting chiefly of small additions to the principal estate, was held not to pass, for the court did not think the testatrix intended to pass it.(*d*)

Lapsed or void devises of real estate are now included in the residuary devise, if any, contained in the will, unless a contrary intention appears therein;(*e*) and no longer go to the testator's heir-at-law as formerly.(*f*)

(*a*) 1 Vict. c. 26, ss. 3, 24. (*b*) 1 Vict. c. 26, ss. 3, 24.
(*c*) Lord St. Leonards' Handy Book, 159.
(*d*) *Webb* v. *Byng*, 1 K. & J. 580.
(*e*) 1 Vict. c. 26, s. 5. (*f*) Will. Real Pro. 212, 13th ed.

A general devise of a testator's land which would describe a copyhold, or customary, or leasehold estate, if the testator had no freehold estate which could be described by it, now includes the copyhold, customary, and leasehold estates, as well as freehold estates, unless a contrary intention appears by the will.(*a*)

A general devise of real estate, or a general bequest of personal estate, now includes real and personal estate over which the testator has a general power of appointment, unless a contrary intention appears by the will.(*b*)

A devise without any words of limitation is to be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in his real estate, unless a contrary intention appears by the will.(*c*)

However, if an annuity is given by will to one indefinitely, the annuitant will take for life only. If it is intended that he shall take beyond his life, words of limitation must be added.(*d*)

In any devise of real or bequest of personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or words which import a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of issue, is to be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of issue, unless a contrary intention appears by the will by reason of such person having a prior estate tail, or a preceding gift, not implied from such words, of an estate tail to such person, or issue, or otherwise.(*e*)

And by the 45 & 46 Vict. c. 39, where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for a term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or not,

(*a*) 1 Vict. c. 26, s. 26. (*b*) 1 Vict. c. 26, s. 27.
(*c*) 1 Vict. c. 26, s. 28.
(*d*) *Kerr* v. *Middlesex Hospital*, 22 L. J. Ch. 355; Sm. Comp. 9, 4th ed. (*e*) 1 Vict. c. 26, s. 29.

that executory limitation is to be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect (sect. 10, sub-sect. 1).

This, however, is only to apply where the executory limitation is contained in an instrument operating after 31st Dec., 1882 (sub-sect. 2).

This enactment may apply to deeds as well as to wills, but its operation will be confined chiefly to the latter as the word "issue" is spoken of in the section.

The event in which the estate is to go over, it will be observed, is the failure of all or any of the issue of the person entitled; and the limitation over is void as soon as any of the issue attain twenty-one. The issue themselves need not, however, be objects of bounty.

Where a person to whom an estate tail, or quasi entail, is devised, dies in the lifetime of the testator, leaving issue inheritable under such entail living at the testator's death, such devise does not lapse, but takes effect as if the death of the devisee had happened immediately after the death of the testator, unless a contrary intention appears by the will.(*a*)

Also where a devisee or legatee is a child or other issue of a testator, and dies in the lifetime of the testator, leaving issue living at the death of the testator, such devise or bequest, not being an interest determinable at the death of the devisee or legatee, is not to lapse, but to take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will.(*b*)

Formerly it was a rule that trust and mortgaged estates held by a testator would pass under a general devise of all his estates, unless a different intention could be collected from the context of his will. And if the will contained complicated limitations of the testator's property, this was considered

(*a*) 1 Vict. c. 26, s. 32. (*b*) 1 Vict. c. 26, s. 33.

sufficient to show a contrary intention. So if the testator charged his real estates with the payment of debts, or legacies, trust or mortgaged estates would not have passed.(*a*)

However, in case of death occurring after the 31st Dec. 1881, we have previously shown that the 44 & 45 Vict. c. 41, s. 30, provides that trust and mortgaged estates vested in any person solely, are, on his death, notwithstanding any testamentary disposition, to devolve upon and become vested in his personal representatives or representative, as if the same were a chattel real.(*b*)

If a testator wishes that his trust estates should go to particular persons, he can appoint them executors for that special purpose.(*c*)

Where a testator devises land to a person who is the testator's heir, such devisee takes the land as a devisee and not by descent.(*d*)

An heir-at-law can only be disinherited by express devise, or by necessary implication; and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed.(*e*)

An estate may sometimes arise under a will by implication; as where a testator devises land to his heir-at-law after the death of A. In this case A. takes an estate for life by implication. It is otherwise, however, if the devise be to a stranger.(*f*)

In drawing wills of testators possessed of both real and personal estate, it is advisable to first dispose of the personal estate and then of the realty, and of all specific and general bequests and devises, and ultimately of the residue.

(*a*) Hawkins' Const. Wills, 35, 36; Hayes and Jar. Conc. Wills, 292, n., 6th ed.

(*b*) See this section and the law hereon, set out fully, *ante*, pp. 103, 104.

(*c*) Wolstenholme and Turner's Conv. Acts, 59, 60, n.

(*d*) 3 & 4 Will. 4, c. 106, s. 3.

(*e*) 1 Jar. Wills, 532, 4th ed.; *Gardner* v. *Sheldon*, L. C. Conv. 541, 2nd ed.; *Hall* v. *Warren*, 5 L. T., N. S. 190.

(*f*) *Gardner* v. *Sheldon*, L. C. Conv. 541, 2nd ed.; Jar. Wills, 525, 4th ed.

If children have been advanced in the testator's lifetime, and a provision is made for them by his will, it should be distinctly stated whether the gift by will is to be in addition to the advancement. And if a legacy has been given by will and another legacy is given to the same person by a codicil, it should be declared by the codicil whether the legatee is to have both. So if children have legacies given them by will, and afterwards the testator advances portions to them on their marriage, it should be declared by a codicil whether they are still to take the legacies.(*a*)

Where a man has a large family to provide for, it is often advisable to direct all his property to be turned into money, out of which he may order his debts and legacies to be first paid, and the residue to be invested in the name of trustees for the benefit of his family.(*b*)

A gift to children, *primâ facie*, imports legitimate children, to the exclusion of illegitimate children.(*c*)

In bequests to children in that character it should be stated whether future born children are to be included. Also whether the testator intends to confine the objects to such children as shall be living at the time of his death, or to extend his bounty to such as shall be living at the time the fund is to be distributed; and whether, in case any of such children should die before the period of distribution arrives, their shares are to be transmissible to their representatives.(*d*) The court leans to a construction which will give portions to all of a class of children who may live to require them.(*e*)

Conditional bequests and devises over in particular events are to be avoided as much as possible. If a thing must be given over after the entire interest has been given to one person it should be stated precisely in what event, and if

(*a*) Lord St. Leonards' Handy Book, 138, 139; Hayes and Jar. Conc. Wills, 527, 8th ed.
(*b*) Lord St. Leonards' Handy Book, 142.
(*c*) 2 Jar. Wills, 217, 4th ed.
(*d*) See Hayes and Jar. Conc. Wills, 217–221, 8th ed.
(*e*) *Re Knowles, Nottage* v. *Burton*, 21 Ch. Div. 806.

depending upon the death of the first legatee, whether it is meant a death in the testator's lifetime, or in the lifetime of the legatee over.(*a*)

It is, however, a general rule decided by a long series of cases, that on a gift to A., and if he dies to B., that means dies in the testator's lifetime.(*b*)

If a testator is possessed of large landed estates, and desires them to remain in the family, they must be strictly settled in the way pointed out, *ante*, p. 143, *et seq.*

Although recent legislation has provided that the property of a married woman is to be her separate property, still provision by will for daughters should be made for their separate use, and free from the debts, control, and engagements of any present or future husbands.(*c*)

The intended legatees and devisees should be so described as to leave no doubt as to their identity.

In making a devise of land to the testator's wife, it must be remembered that as to women married since the 1st January, 1834, the 3 & 4 Will. 4, c. 105, enacts that where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised to or for her benefit, she is not to be entitled to dower out of or in any land of her husband, unless a contrary intention is declared by his will (sect. 9). But no gift or bequest by the husband to his widow of or out of his personal estate, or of or out of any of his land *not* liable to dower, will defeat her right to dower, unless a contrary intention be declared by his will (sect. 10).

Although sect. 4 of this Act enacts "that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will," it would appear advisable to declare by the will whether the wife is to be barred of her dower or not. For

(*a*) Lord St. Leonards' Handy Book, 141.
(*b*) *Elliot* v. *Smith*, 22 Ch. Div. 236.
(*c*) Hayes and Jar. Conc. Wills, 528, 8th ed.; 45 & 46 Vict. c. 75, ss. 1, 2, 4, 19; *et ante*, pp. 3, 4, 182.

in *Rowland* v. *Cuthbertson*(*a*), Lord Romilly, M.R., expressed an opinion that a mere general devise of lands was insufficient to bar the dower of the testator's widow in any of his lands included in such devise. In a late case, however, viz., that of *Lacey* v. *Hill*(*b*), the contrary was decided.

All property of a deceased owner, real as well as personal, is now liable to the payment of his debts, whether due under a special or a simple contract.(*c*)

The personal estate is the primary fund for the payment of debts.(*d*) Therefore, if a testator wishes to charge a particular fund, in exclusion of his other property, with the payment of his debts, that fund should be designated by his will, with power for the trustees and executors to sell the same.(*e*) The 22 & 23 Vict. c. 35, s. 14, enacts that where a testator has charged his real estate, or any portion thereof, with the payment of his debts or legacies, &c., and has devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and has not made express provision for raising such debts or legacies, &c., out of such estate, it is lawful for the trustee or trustees, notwithstanding any trusts actually declared by the testator, to raise such debts, or legacies, &c., by sale by public auction or private contract of the property or any part thereof, or by mortgage thereof, or partly in one mode, and partly in the other.

By sect. 15 the above powers may be exercised by any one in whom the estate is vested by survivorship, descent, or devise, or by any person appointed under any power in the will, or by the Chancery Division of the High Court, to succeed to the trusteeship.

By sect. 16, if the whole estate and interest of the testator be not devised to a trustee or trustees, then the executors of the will have the powers conferred by the 14th section.

(*a*) L. R. 8 Eq. 466. (*b*) L. R. 19 Eq. 346; 23 W. R. 285.
(*c*) 3 & 4 Will. 4, c. 104; 32 & 33 Vict. c. 46.
(*d*) *Silk* v. *Prime*, 2 L. C. Eq. 102, n., 2nd ed.
(*e*) See Lord St. Leonards' Handy Book, 139; Eddis on Assets, 80.

And under the 44 & 45 Vict. c. 44, s. 35, a sufficient trust for sale may be created by using the words "upon trust to sell the said premises," and a sufficient power of sale by using the words "with power to sell the said premises," (*a*) as to instruments coming into operation after the 31st Dec., 1881. It has also been shown (*ante*, p. 147) that trustees can give a sufficient receipt and discharge for money, securities, or property, &c., payable, transferable, or deliverable to them.

By sect. 37 of the above Act an executor may pay or allow any debt or claim on any evidence that he thinks sufficient. So he, or two or more trustees acting together, or a sole acting trustee, where, by the instrument creating the trust, he is authorised to execute the trusts and powers thereof, may accept any composition or security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow time for payment of any debt, may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes may enter into, give, execute, and do, such agreements, releases, and other things, as to him or them seem expedient, without being responsible for any loss occasioned thereby if done in good faith (sub-sects. 1, 2).

The section only applies to trustees if and so far as a contrary intention is not expressed in the instrument, if any, creating the trust (sub-sect. 3).

This section, it will be observed, does not apply to an administrator, who might be merely a creditor, or some other person, not necessarily a proper person to be invested with such large powers.(*b*)

By sect. 38, where a power or trust is given to or vested in two or more executors or trustees jointly, then, unless the

(*a*) See Wolstenholme and Turner's Conv. Acts, 64 n.; *et ante*, p. 146.

(*b*) Wolstenholme and Turner's Conv. Acts, 65, n.; see also *Re Owens, Jones* v. *Owens*, 47 L. T., N. S. 61.

contrary is expressed in the instrument creating the trust or power (operating after the 31st December, 1881), the same may be exercised or performed by the survivor or survivors of them for the time being.

This section removes any difficulty as to whether one surviving executor can sell under a devise to executors to sell.(*a*)

As to the fund for the payment of mortgage debts, see *ante*, p. 106.

We now come to speak of the mode in which a will is to be executed and attested; and to this end the provisions of the 7 Will. 4 & 1 Vict. c. 26, and the 15 Vict. c. 24, must be complied with. The difference in the mode of execution previously existing between wills of real and personal estate is taken away by the 7 Will. 4 & 1 Vict. c. 26, s. 9, which enacts that no will is to be valid unless it be in writing, and signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature must be made or acknowledged(*b*) by the testator in the presence of two or more witnesses present at the same time, and such witnesses must attest and subscribe the will in the presence of the testator; but no form of attestation is necessary.

The strictness with which the courts construed the words "at the foot or end thereof" caused many wills to be rendered void.(*c*) An Act was therefore passed to remedy this, and it provides that a will shall be valid if the signature is placed at, or after, or following, or under, or beside, or opposite to the end of the will, if it is apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will, &c.(*d*)

The incompetency of any witness to a will at the time of the execution, or at any time afterwards, does not invalidate

(*a*) Wolstenholme and Turner's Conv. Acts, 65, 66, n.
(*b*) See *Blake* v. *Blake*, 46 L. T., N. S. 641.
(*c*) Lord St. Leonards' Handy Book, 142.
(*d*) 15 Vict. c. 24.

the will.(*a*) But if any person attests the execution of any will to whom, or to whose wife or husband, any beneficial interest is thereby given (except a charge for the payment of debts) the gift is void; the person so attesting is, however, a good witness to prove the execution of the will, or to prove the validity or invalidity thereof.(*b*) A creditor is also a good attesting witness to the execution of a will, although the will contains a charge for the payment of debts.(*c*) So are the executors of the will.(*d*)

It is provided that any soldier in actual military service, or any mariner or seaman at sea, may dispose of his personal estate as he might have done before this Act.(*e*)

A will duly executed, made by a man or woman, is revoked by his or her marriage (except a will made in exercise of a power of appointment, when the estate thereby appointed would not, in default of such appointment, pass to the heir, executor, or administrator, or the next of kin, under the statute of distributions.(*f*)

A will may also be revoked by another will or codicil duly executed, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed; or by burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction with the intention of revoking it.(*g*)

A covenant not to revoke a will is, it seems, a lawful covenant, provided it is not in restraint of marriage.(*h*) Marriage, it will be remembered, is a revocation of a will.(*i*)

No obliteration, interlineation, or other alteration made in a will after execution thereof is valid (except so far as the words or effect of the will before such alteration be not apparent), unless the alteration be executed like a will; but

(*a*) 1 Vict. c. 26, s. 14.
(*b*) 1 Vict. c. 26, s. 15.
(*c*) 1 Vict. c. 26, s. 16.
(*d*) 1 Vict. c. 26, s. 17.
(*e*) 1 Vict. c. 26, s. 11.
(*f*) 1 Vict. c. 26, s. 18.
(*g*) 1 Vict. c. 26, s. 20.
(*h*) *Robinson* v. *Ommany*, 21 Ch. Div. 780.
(*i*) 1 Vict. c. 26, s. 18.

the will with such alteration as part thereof, is to be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses be made in the margin or other part of the will opposite or near to the alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.(*a*)

And all important alterations made in a will before execution should, as a proper precaution, be noticed in the attestation clause, or they must be proved to have existed in the will before execution. When the alterations are of but small importance they may be evidenced by the initials of the attesting witnesses in the margin of the will opposite the alterations.(*b*)

No will is to be revoked by any presumption of an intention on the ground of an alteration in circumstances.(*c*) But, as before shown, marriage causes a revocation of a will.

No will or codicil, or any part thereof, which is revoked, can be revived except by the re-execution thereof, or by a codicil duly executed and showing an intention to revive the same. And when a will or codicil has been partly revoked, and afterwards wholly revoked, and is then revived, such revival does not extend to that part which was revoked before the revocation of the whole, unless a contrary intention is shown.(*d*)

A will or codicil not duly executed may be rendered valid by a later codicil duly executed and referring clearly to the defective will or codicil.(*e*) But if a testator has several wills and codicils, and some are duly executed and some are not, and by a codicil duly executed he expressly confirms all his wills and codicils, this codicil only confirms those which

(*a*) 1 Vict. c. 26, s. 21. (*b*) See Prob. Rules, N. C., 8, 9.
(*c*) 1 Vict. c. 26, s. 19. (*d*) 1 Vict. c. 26, s. 22.
(*e*) *Allan* v. *Maddock*, 31 L. T. Rep. 359; Sug. R. P. Stats. 345.

are duly executed, for they by themselves will satisfy the strict meaning of the words.(*a*)

And it seems that if a will is revoked by actual destruction, as if it be burnt, a codicil clearly referring to it cannot revive it as a will in writing within the 9th section of the 1 Vict. c. 26.(*b*)

This Act further provides that no conveyance or other act made or done subsequently to the execution of a will of real or personal estate comprised therein (except an act of revocation as before mentioned), is to prevent the operation of the will with respect to the interest in such real or personal estate as the testator has power to dispose of by will at the time of his death.(*c*) But if a testator, after disposing of real or personal estate by his will, subsequently conveys or parts with such property, or a portion of it, the will is necessarily revoked either wholly or partially, according to the extent of the subsequent dealing with the property.(*d*) If, however, the testator were to repurchase such property it would now pass under the will, as the will takes effect from the death of the testator, unless a contrary intention appears thereby.(*e*) However, a learned writer recommends that if the same estate should be repurchased, not to trust to the former gift, but to have the will re-executed, or rather to execute a codicil and confirm the gift in the will.(*f*)

It is not advisable to appoint too many trustees or executors of a will; two or three are sufficient. If the will disposes of both real and personal estate and declares trusts, the same persons may fill the characters of both trustees and executors.

If one of the trustees dies in the testator's lifetime a new trustee must be appointed by a codicil to the will.

(*a*) Lord St. Leonards' Handy Book, 151.
(*b*) *Rogers et al.* v. *Goodenough et al.*, 5 L. T., N. S. 719; see also *Newton* v. *Newton*, *ib.*, 218. (*c*) 1 Vict. c. 26, s. 23.
(*d*) *Moore* v. *Raisebeck*, 12 Sim. 123, 139; *Farrer* v. *Winterton*, *ib.*, 140, n. (*e*) 1 Vict. c. 26, s. 24.
(*f*) Lord St. Leonards' Handy Book, 159, 160.

As to the appointment of new trustees after the death of a testator, the remarks made *ante*, p. 160 *et seq.*, as to the appointment of new trustees, and the vesting of the trust property, &c., apply to the appointment of new trustees under a will.

Where any real estate is devised to a trustee without any express limitation of the estate to be taken by him, and the beneficial interest therein is not given to any person for life, or is given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise is to be construed to vest in the trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust are satisfied.(*a*)

If a testator is possessed of copyhold estates, and wishes them to be sold after his decease, they should not be devised to the trustees of the will for sale, for if this were done the trustees would have to be admitted tenants of the manor, and pay the fine due to the lord thereon. To avoid this the will should contain a mere direction that the trustees should sell the estates, and on the sale the purchaser will be admitted at once. This mode of proceeding, however, is only applicable where the copyholds are to be sold immediately after the testator's death.(*b*)

The 1 Vict. c. 26, s. 3, empowers a person possessed of copyholds to devise his interest without any surrender to the use of his will, and although entitled to be admitted thereto he had not been admitted.

By sect. 5 the will, or so much thereof as relates to the copyholds, must be entered on the court rolls of the manor, the trusts thereof, if any, need not, however, be so entered, but merely referred to.

The will having been drawn, an appointment is made with the testator to read it over to him. After it has been

(*a*) 1 Vict. c. 26, s. 31. (*b*) Scriv. Cop. 234, 5th ed.

approved of by him it is fair copied on brief paper, and signed by him in the mode pointed out, *ante*, p. 191. If the will consists of several sheets of paper, it is usual for the testator to sign each sheet, as well as the last sheet of the will, opposite the attestation clause, which are also subscribed by the witnesses in such a position that the testator may see them. This done the will is either handed over to the testator, or left with the solicitor for safe custody.

Forms of wills will be found in Hayes and Jarman's Concise Forms of Wills.

CHAPTER IX.

PARTNERSHIP.

A PARTNERSHIP is usually formed by an agreement between two or more persons to carry on a business or undertaking for their mutual profit.

Traders become partners between themselves by a mutual participation of profit and loss; but, as to third parties, they are partners if they share the profits of a concern, except so far as this rule is modified by the 28 & 29 Vict. c. 86. And further, if anyone lends his name and credit to a firm, and, as the phrase is, holds himself out to the world as a partner therein, he is liable for its engagements, and that whether he has any real interest in the concern or not.(*a*)

A dormant partner is liable when discovered, though the person dealing with the firm did not, at the time of dealing, know him to be a partner.(*b*)

The 28 & 29 Vict. c. 86, s. 1, provides that the advance of money by way of loan to a person engaged or about to engage in any trade or undertaking, upon a written contract with such person that the lender shall receive a rate of interest varying with the profits, or a share of the profits arising from such trade or undertaking, shall not of itself constitute the lender a partner with the person carrying on such trade or undertaking.(*c*)

Sect. 2 provides that no contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or under-

(*a*) See *Waugh* v. *Carver*, Smith's L. C., vol. i.
(*b*) *Wintle* v. *Crowther*, 1 C. & J. 316.
(*c*) See *Syers* v. *Syers*, L. R. 1 App. Cas. 174

taking shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner.

By sect. 4 no person receiving, by way of annuity or otherwise, a portion of the profits of any business in consideration of the sale by him of the goodwill of such business, is, by reason only of such receipt, to be deemed to be a partner of, or be subject to, the liabilities of the person carrying on such business. See also sect. 3.

Sect. 5, however, enacts that, if such trader is adjudged bankrupt, &c., or agrees to pay his creditors less than 20*s.* in the pound, or dies in insolvent circumstances, the lender of any such loan shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall the vendor of a goodwill be entitled to recover any such profits as aforesaid until the claims of the other creditors of the trader for value have been satisfied.

By sect. 6 the word "person" in the Act is to include a partnership firm, a joint stock company, and a corporation.

And if a trading concern be carried on by trustees for the benefit of creditors, the creditors will not from the mere fact of their debts being paid out of the profits be liable as partners for the debts incurred.(*a*)

When the relation of partners has been established between two or more persons, either ostensibly or by participation of profits, each partner incurs liability from the acts and dealings of the other in the ordinary course of business. For any one partner may buy, sell, or pledge goods, receive moneys, release and compound debts, give guarantees, draw, accept, or indorse bills of exchange and promissory notes in the name and on account of the firm in the ordinary course of business.(*b*)

(*a*) *Wheatcroft* v. *Hickman*, 9 C. B., N. S. 47.
(*b*) Will. Per. Pro. 351, 9th ed.; 45 & 46 Vict. c. 61, s. 23.

But where bill transactions form no part of the ordinary business of the partnership, one partner cannot bind the firm in this way;(*a*) therefore partners in legal, mining, and farming partnerships cannot bind the firm by bill or note.(*b*) Nor can railway companies do so.(*c*) Nor companies registered under the Companies Act of 1862, unless such a power can be gathered from a fair construction of the articles of association.(*d*)

Each partner is also answerable for the fraud of his co-partner in any matter relating to the business of the partnership. And in like manner notice of any matter relating to the partnership, if given to one partner, is constructively notice to all the partners. And any agreement between the partners, by which any one of them may be restrained from doing any act to pledge the credit of the firm, though binding as between themselves, will not be binding on any creditor who may not have notice of it. If, however, the transaction be not in the ordinary course of the business of the firm the other partners will not be liable as such in respect of it. Thus, one partner cannot bind the firm by a submission to arbitration; and one partner has ordinarily no authority to execute a deed in the names of the others so as to bind the firm; and, as we have already seen, one partner cannot, in the case of non-trading partnerships, bind the firm by bill or note.(*e*)

The rights and liabilities of the partners as between themselves are usually regulated by express contract.

A properly drawn partnership deed defines the nature and place of the business, the duration of the partnership, the name or style of the firm, and states the amount of capital brought

(*a*) See 45 & 46 Vict. c. 61, s. 22; Chalmer's Bill of Ex. Act, 14, 15.

(*b*) Sm. Merc. Law, 42, 9th ed.

(*c*) *Bateman* v. *Mid-Wales Railway Company*, L. R. 1 C. P. 499.

(*d*) *Peruvian Railway Company* v. *Thames, &c., Insurance Company*, L. R. 2 Ch. App. 617.

(*e*) Will. Per. Pro. 351, 352, 9th ed.; Sm. Mer. Law, 35 *et seq.*, 9th ed.; Chalmer's Bills of Exch. Act, 14, 15.

in, and by whom and in what shares, and the proportions in which the profits and losses are to be divided. The attention to be devoted by the partners to the business should also be stated. It should also specify who are to be the bankers of the firm, and by whom the cheques are to be drawn, and provide for a yearly or other periodical balancing of accounts, and for the arrangements to be made on the determination of the partnership, whether by effluxion of time, or by the death or bankruptcy of a partner or otherwise.(*a*)

Where the capital is brought in by the partners equally, and they share equally in any profits made, there is no difficulty in framing the clause thereon in the partnership deed, but, if this is not the case, the respective rights of the partners as regards capital, and profits and losses, must be carefully defined. Suppose for instance one partner brings in all, or nearly all, the capital, and the agreement is that the partners are to share equally in the profits simply. Here the capital will be considered as thrown into the common fund, and will, like the profits, belong to the partners equally.(*b*)

A partnership determines not only by effluxion of time, but by the death or bankruptcy of a partner. Lunacy does not of itself determine the partnership, but, under the 16 & 17 Vict. c. 70, the Lord Chancellor may, on the application of the other partners, decree a dissolution.(*c*)

It is not unusual to provide that none of the partners shall engage in any other trade, or improperly pledge the credit of the firm, &c., and in the event of these or other breaches of duty by a partner, the other partners shall have power to dissolve the partnership.(*d*)

Where it is intended that the business shall be carried on

(*a*) 2 Prid. Conv. 628, 11th ed.; 5 David. Conv. 304 *et seq.*, 3rd ed.
(*b*) 2 Prid. Conv. 628, 11th ed.; 5 David. Conv. 308, 3rd ed.
(*c*) 2 Prid. Conv. 629, 11th ed. (*d*) 2 Prid. Conv. 629, 11th ed.

after the death or retirement of a partner, special provisions should be introduced into the partnership deed as to the mode of ascertaining the share of the deceased or outgoing partner, and the mode of its payment, and thus prevent a compulsory winding-up of the affairs of the concern. One plan is to provide that the share of capital shall be taken at its value as ascertained by the last yearly balance-sheet, with a sum by way of interest from that time to the time of death or retirement in lieu of profits. This plan prevents a fresh balancing of accounts, &c., but it is open to the objection that any losses that may have occurred since that event will fall on the continuing partners. Another way is to give the continuing partners the option of purchasing the share of the deceased, or retiring partner, at a valuation. If anything is to be allowed for goodwill in such a case it should be so stated.(*a*)

Recitals are not often necessary in a partnership deed. The operative part of the deed will consist of mutual covenants by all the intended partners to enter into partnership, for the specified purpose, and period, and under the stipulations set forth in the body of the deed.(*b*)

If the number of partners exceeds two, the majority should have power to decide for all; and that matters in dispute be decided by arbitration, or as agreed by the articles of partnership.(*c*)

When the partnership ends either by effluxion of time or by agreement, the deed must provide for taking an account of the partnership property, debts and liabilities, and that after payment of the debts and liabilities, a division or distribution be made of the property and effects.(*d*)

When a partner retires notice of the fact should be given in the *London Gazette*, which is sufficient as against all per-

(*a*) 2 Prid. Conv. 629, 630, 11th ed.
(*b*) 5 David. Conv. 304, 305, 3rd ed.
(*c*) See 5 David. Conv. 312, 3rd ed.
(*d*) 5 David. Conv. 314, 3rd ed.

sons who had no dealings with the old firm, but it is necessary to give express notice to old customers, in order that the retiring partner may avoid future responsibility.(*a*)

For forms of partnership deeds see Prid. Conv. vol. ii., and David. Conv. vol. v., pt. 2.

(*a*) Sm. Merc. Law, 48, 8th ed.

APPENDIX.

SOLICITORS' REMUNERATION ACT, 1881.

44 & 45 VICT. c. 44.

An Act for making better provision respecting the Remuneration of Solicitors in Conveyancing and other non-contentious Business.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

1. *Short title; extent; interpretation.*—(1.) This Act may be cited as the Solicitors' Remuneration Act, 1881.

(2.) This Act does not extend to Scotland.

(3.) In this Act—

"Solicitor" means a solicitor or proctor qualified according to the statutes in that behalf:

"Client" includes any person who, as a principal, or on behalf of another, or as a trustee or executor, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ, a solicitor, and any person for the time being liable to pay to a solicitor, for his services, any costs, remuneration, charges, expenses, or disbursements:

"Person" includes a body of persons corporate or unincorporate:

"Incorporated Law Society" means, in England, the society referred to under that title in the Act passed in the session of the twenty-third and twenty-fourth years of Her Majesty's reign, intituled "An Act to amend the Laws relating to

Attorneys, Solicitors, Proctors, and Certificated Conveyancers;" and, in Ireland, the society referred to under that title in the Attorneys and Solicitors Act, Ireland, 1866:

"Provincial law societies or associations" means all bodies of solicitors in England incorporated by Royal Charter, or under the Joint Stock Companies Act, other than the Incorporated Law Society above mentioned.

General Orders.

2. *Power to make General Orders for remuneration in conveyancing, &c.*—In England, the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, and the president for the time being of the Incorporated Law Society, and the president of one of the provincial law societies or associations, to be selected and nominated from time to time by the Lord Chancellor to serve during the tenure of office of such president, or any three of them, the Lord Chancellor being one, and, in Ireland, the Lord Chancellor, the Lord Chief Justice of Ireland, the Master of the Rolls, and the president for the time being of the Incorporated Law Society, or any three of them, the Lord Chancellor being one, may from time to time make any such general order as to them seems fit for prescribing and regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business not being business in any action, or transacted in any court, or in the chambers of any judge or master, and not being otherwise contentious business, and may revoke or alter any such order.

3. *Communication to Incorporated Law Society.*—One month at least before any such general order shall be made, the Lord Chancellor shall cause a copy of the regulations and provisions proposed to be embodied therein to be communicated in writing to the Council of the Incorporated Law Society, who shall be at liberty to submit such observations and suggestions in writing as they may think fit to offer thereon; and the Lord Chancellor, and the other persons hereby authorised to make such order, shall take into consideration any such observations or suggestions which may be submitted to them by the said Council within one month from the day on which such communication to the said Council shall have been made as aforesaid, and, after duly considering the same, may make such order, either in the form or to the effect originally

communicated to the said Council, or with such alterations, additions, or amendments, as to them may seem fit.

4. *Principles of remuneration.*—Any general order under this Act may, as regards the mode of remuneration, prescribe that it shall be according to a scale of rates of commission or per-centage, varying or not in different classes of business, or by a gross sum, or by a fixed sum for each document prepared or perused, without regard to length, or in any other mode, or partly in one mode and partly in another, or others, and may, as regards the amount of the remuneration, regulate the same with reference to all or any of the following, among other, considerations, (namely,)

The position of the party for whom the solicitor is concerned in any business, that is, whether as vendor or as purchaser, lessor or lessee, mortgagor or mortgagee, and the like:

The place, district and circumstances at or in which the business or part thereof is transacted:

The amount of the capital money or of the rent to which the business relates:

The skill, labour, and responsibility involved therein on the part of the solicitor:

The number and importance of the documents prepared or perused, without regard to length:

The average or ordinary remuneration obtained by solicitors in like business at the passing of this Act:

5. *Security for costs, and interest on disbursements.*—Any general order under this Act may authorise and regulate the taking by a solicitor from his client of security for future remuneration in accordance with any such order, to be ascertained by taxation or otherwise, and the allowance of interest.

6. *Order to be laid before Houses of Parliament; disallowance on address.*—(1.) Any general order under this Act shall not take effect unless and until it has been laid before each House of Parliament, and one month thereafter has elapsed.

(2.) If within that month an address is presented to the Queen by either House, seeking the disallowance of the order, or part thereof, it shall be lawful for Her Majesty, by Order in Council, to disallow the order, or that part, and the order or part disallowed shall not take effect.

7. *Effect of order as to taxation.*—As long as any general order under this Act is in operation, the taxation of bills of costs of solicitors shall be regulated thereby.

Agreements.

8. *Power for solicitor and client to agree on form and amount of remuneration.*—(1.) With respect to any business to which the foregoing provisions of this Act relate, whether any general order under this Act is in operation or not, it shall be competent for a solicitor to make an agreement with his client, and for a client to make an agreement with his solicitor, before or after or in the course of the transaction of any such business, for the remuneration of the solicitor, to such amount and in such manner as the solicitor and the client think fit, either by a gross sum, or by commission or percentage, or by salary, or otherwise; and it shall be competent for the solicitor to accept from the client, and for the client to give to the solicitor, remuneration accordingly.

(2.) The agreement shall be in writing, signed by the person to be bound thereby or by his agent in that behalf.

(3.) The agreement may, if the solicitor and the client think fit, be made on the terms that the amount of the remuneration therein stipulated for either shall include or shall not include all or any disbursements made by the solicitor in respect of searches, plans, travelling, stamps, fees, or other matters.

(4.) The agreement may be sued and recovered on or impeached and set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor; and if, under any order for taxation of costs, such agreement being relied upon by the solicitor shall be objected to by the client as unfair or unreasonable, the taxing master or officer of the court may inquire into the facts, and certify the same to the court; and if, upon such certificate, it shall appear to the court or judge that just cause has been shown either for cancelling the agreement, or for reducing the amount payable under the same, the court or judge shall have power to order such cancellation or reduction, and to give all such directions necessary or proper for the purpose of carrying such order into effect, or otherwise consequential thereon, as to the court or judge may seem fit.

9. *Restriction on Solicitors Act*, 1870—33 & 34 *Vict. c.* 28.—The Attorneys and Solicitors' Act, 1870, shall not apply to any business to which this Act relates.

GENERAL ORDER MADE IN PURSUANCE OF THE SOLICITORS' REMUNERATION ACT, 1881.

(44 & 45 VICT. c. 44).

We, the Right Honourable Roundell Baron Selborne, Lord High Chancellor of Great Britain, the Right Honourable John Duke, Lord Coleridge, Lord Chief Justice of England, the Right Honourable Sir George Jessel, Master of the Rolls, and Enoch Harvey, Esq., President of the Incorporated Law Society of Liverpool (being four of the persons in that behalf authorized by the statute 44 & 45 Vict. c. 44), do hereby, in pursuance and execution of the powers given to us by the said statute, and of all other powers and authorities enabling us in that behalf, order and direct in the manner following:—

1. This order is to take effect from and after the 31st day of December, 1882, except that Schedule I. hereto shall not apply to transactions respecting real property, the title to which has been registered under the Acts of 25 & 26 Vict. c. 53, 25 & 26 Vict. c. 67, and 38 & 39 Vict. c. 87.

2. Subject to the exception aforesaid, the remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business, not being business in any action, or transacted in any court, or in the chambers of any judge or master, is to be regulated as follows, namely:—

(*a.*) In respect of sales, purchases and mortgages completed, the remuneration of the solicitor having the conduct of the business, whether for the vendor, purchaser, mortgagor or mortgagee, is to be that prescribed in Part I. of Schedule I. to this order, and to be subject to the regulations therein contained.

(*b.*) In respect of leases, and agreements for leases, of the kinds mentioned in Part II. of Schedule I. to this order, or conveyances reserving rent, or agreements for the same, when the transactions shall have been completed, the remuneration of the solicitor having

the conduct of the business is to be that prescribed in Part II. of such Schedule I.

(*c.*) In respect of business not hereinbefore provided for, connected with any transaction the remuneration for which, if completed, is hereinbefore, or in Schedule I. hereto, prescribed, but which is not, in fact, completed, and in respect of settlements, mining leases or licences, or agreements therefor, re-conveyances, transfers of mortgage, or further charges, not provided for hereinbefore or in Schedule I. hereto, assignments of leases not by way of purchase or mortgage, and in respect of all other deeds or documents, and of all other business the remuneration for which is not hereinbefore, or in Schedule I. hereto, prescribed, the remuneration is to be regulated according to the present system as altered by Schedule II. hereto.

3. Drafts and copies made in the course of business, the remuneration for which is provided for by this order, are to be the property of the client.

4. The remuneration prescribed by Schedule I. to this order is not to include stamps, counsel's fees, auctioneer's or valuer's charges, travelling or hotel expenses, fees paid on searches to public officers, on registrations, or to stewards of manors, costs of extracts from any register, record, roll, or other disbursement reasonably and properly paid, nor any extra work occasioned by changes occurring in the course of any business, such as the death or insolvency of a party to the transaction, nor is it to include any business of a contentious character, nor any proceedings in any court, but it shall include law stationer's charges, and allowances for time of the solicitor and his clerks, and for copying and parchment, and all other similar disbursements.

5. In respect of any business which is required to be, and is, by special exertion, carried through in an exceptionally short space of time, a solicitor may be allowed a proper additional remuneration for the special exertion, according to the circumstances.

6. in all cases to which the scales prescribed in Schedule I. hereto shall apply, a solicitor may, before undertaking any business, by writing under his hand, communicated to the client, elect that his remuneration shall be according to the present system as altered by Schedule II. hereto; but if no such election shall be made, his remuneration shall be according to the scale prescribed by this order.

7. A solicitor may accept from his client, and a client may give

to his solicitor, security for the amount to become due to the solicitor for business to be transacted by him, and for interest on such amount, but so that interest is not to commence till the amount due is ascertained, either by agreement or taxation. A solicitor may charge interest at 4 per cent. per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demand from the client. And in cases where the same are payable by an infant, or out of a fund not presently available, such demand may be made on the parent or guardian, or the trustee or other person liable.

8. In this order, and the schedules hereto, the following words and expressions shall have the meaning ascribed to them in the 3rd sub-section of section 1 of the Solicitors' Remuneration Act, 1881, viz.:—

Solicitor,
Client,
Person.

SCHEDULE II.

PART I.

Scale of Charges on Sales, Purchases, and Mortgages, and Rules applicable thereto.

SCALE.

	(1.) For the 1st 1000*l.*	(2.) For the 2nd and 3rd 1000*l.*	(3.) For the 4th and each subsequent 1000*l.* up to 10,000*l.*	(4.) For each subsequent 1000*l.* up to 100,000*l.**
Vendor's solicitor for negotiating a sale of property by private contract... ...	20*s.* per 100*l.*	20*s.* per 100*l.*	10*s.* per 100*l.*	5*s.* per 100*l.*
Do., do., for conducting a sale of property by public auction, including the conditions of sale—				
When the property is sold	20*s.* ,,	10*s.* ,,	5*s.* ,,	2*s.* 6*d.* ,,
When the property is not sold, then on the reserved price	10*s.* ,,	5*s.* ,,	2*s.* 6*d.* ,,	1*s.* 3*d.* ,,
[N.B.—A minimum charge of 5*l.* to be made whether a sale is effected or not.]				
Do., do., for deducing title to freehold, copyhold, or leasehold property, and perusing, and completing conveyance (including preparation of contract, or conditions of sale, if any)	30*s.* ,,	20*s.* ,,	10*s.* ,,	5*s.* ,,
Purchaser's solicitor for negotiating a purchase of property by private contract	20*s.* ,,	20*s.* ,,	10*s.* ,,	5*s.* ,,
Do., do., for investigating title to freehold, copyhold, or leasehold property, and preparing and completing conveyance (including perusal and completion of contract, if any)	30*s.* ,,	20*s.* ,,	10*s.* ,,	5*s.* ,,
Mortgagor's solicitor for deducing title to freehold, copyhold, or leasehold property, perusing mortgage, and completing	30*s.* ,,	20*s.* ,,	10*s.* ,,	5*s.* ,,
Mortgagee's solicitor for negotiating loan	20*s.* ,,	20*s.* ,,	5*s.* ,,	2*s.* 6*d.* ,,
Do., do., for investigating title to freehold, copyhold, or leasehold property; and preparing and completing mortgage	30*s.* ,	20*s.* ,,	10*s.* ,,	5*s.* ,,
Vendor's or mortgagor's solicitor for procuring execution and acknowledgment of deed by a married woman	2*l.* 10*s.* extra.			

* Every transaction exceeding 100,000*l.* to be charged for as if it were for 100,000*l.*

RULES.

1. The commission for deducing title and perusing and completing conveyance on a sale by auction is to be chargeable on each lot of property, except that where a property held under the same title is divided into lots for convenience of sale, and the same purchaser buys several such lots and takes one conveyance, and only one abstract is delivered, the commission is to be chargeable upon the aggregate prices of the lots.

2. The commission on an attempted sale by auction in lots is to be chargeable on the aggregate of the reserved prices. When property offered for sale by auction is bought in and terms of sale are afterwards negotiated and arranged by the solicitor, he is to be entitled to charge commission according to the above scales on the reserved price where the property is not sold, and also one-half of the commission for negotiating the sale. When property is bought in and afterwards offered by auction by the same solicitor, he is only to be entitled to the scale for the first attempted sale, and for each subsequent sale ineffectually attempted, he is to charge according to the present system, as altered by Schedule II. hereto. In case of a subsequent effectual sale by auction, the full commission for an effectual sale is to be chargeable in addition, less one-half of the commission previously allowed on the first attempted sale. The provisions of this Rule as to commission on sales or attempted sales by auction are to be subject to Rule 2.

3. Where a solicitor is concerned for both mortgagor and mortgagee, he is to be entitled to charge the mortgagee's solicitor's charges and one-half of those which would be allowed to the mortgagor's solicitor up to 5000*l.*, and on any excess above 5000*l.*, one-fourth thereof.

4. If a solicitor peruses a draft on behalf of several parties having distinct interests, proper to be separately represented, he is to be entitled to charge 2*l.* additional for each such party after the first.

5. Where a party, other than the vendor or mortgagor, joins in a conveyance or mortgage, and is represented by a separate solicitor, the charges of such separate solicitor are to be dealt with under the old system as altered by Schedule II. hereto.

6. Where a conveyance and mortgage of the same property are completed at the same time, and are prepared by the same solicitor, he is to be entitled to charge only half the above fees for investigating title, and preparing the mortgage deed up to 5000*l.*, and, on any excess above 5000*l.*, one-fourth thereof, in addition to his full charges upon the purchase money and his commissions for negotiating (if any).

7. Fractions of 100*l.*, under 50*l.*, are to be reckoned as 50*l.* Fractions of 100*l.*, above 50*l.*, are to be reckoned as 100*l.*

8. Where the prescribed remuneration would, but for this provision,

amount to less than 5*l.*, the prescribed remuneration shall be 5*l.*, except on transactions under 100*l.*, in which cases the remuneration of the solicitor for the vendor, purchaser, mortgagor, or mortgagee, is to be 3*l.*

9. Where a property is sold subject to incumbrances, the amount of the incumbrances is to be deemed a part of the purchase-money, except where the mortgagee purchases, in which case the charge of his solicitor shall be calculated upon the price of the equity of redemption.

10. The above scale as to mortgages is to apply to transfers of mortgages where the title is investigated, but not to transfers where the title was investigated by the same solicitor on the original mortgage or on any previous transfer; and it is not to apply to further charges where the title has been so previously investigated. As to such transfers and further charges the remuneration is to be regulated according to the present system as altered by Schedule II. hereto. But the scale for negotiating the loan shall be chargeable on such transfers and further charges where it is applicable.

11. The scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer. The scale for negotiating shall apply to cases where the solicitor of a vendor or purchaser arranges the sale or purchase and the price and terms and conditions thereof, and no commission is paid by the client to an auctioneer, or estate or other agent. As to a mortgagee's solicitor it shall only apply to cases where he arranges and obtains the loan from a person for whom he acts. In case of sales under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser, the scale shall not apply.

12. In cases where, under the previous portion of this Schedule, a solicitor would be entitled to charge a commission for negotiating a sale or mortgage, or for conducting a sale by auction, and he shall not charge such commission, then he shall be entitled to charge the rates allowed by the first column on all transactions up to 2000*l.*, and to charge in addition those allowed by the second column on all amounts above 2000*l.*, and not exceeding 5000*l.*, and further to charge those allowed by the third column on all amounts above 5000*l.*, and not exceeding 50,000*l.*, instead of the rates allowed up to the amounts mentioned in those columns respectively.

PART II.

Scale of Charges as to Leases, or Agreements for Leases, at Rack Rent (other than a mining Lease, or a Lease for Building Purposes, or Agreement for the same).

Lessor's solicitor for preparing, settling, and completing lease and counterpart:—

Where the rent does not exceed 100*l.*	7*l.* 10*s.* per cent. on the rental, but not less in any case than 5*l.*
Where the rent exceeds 100*l.* and does not exceed 500*l.*	7*l.* 10*s.* in respect of the first 100*l.* of rent, and 2*l.* 10*s.* in respect of each subsequent 100*l.* of rent.
Where the rent exceeds 500*l.* ...	7*l.* 10*s.* in respect of the first 100*l.* of rent, 2*l.* 10*s.* in respect of each 100*l.* of rent up to 500*l.*, and 1*l.* in respect of every subsequent 100*l.*
Lessee's solicitor for perusing draft and completing.	One-half of the amount payable to the Lessor's solicitor.

Scale of Charges as to Conveyance in Fee, or for any other Freehold Estate, Reserving Rent, or Building Leases Reserving Rent, or other Long Leases not at Rack Rent (except Mining Leases), or Agreements for the same respectively.

Vendor's or lessor's solicitor for preparing, settling, and completing conveyance and duplicate, or lease and counterpart:—

Amount of Annual Rent.	Amount of Remuneration.
Where it does not exceed 5*l.*	5*l.*
Where it exceeds 5*l.* and does not exceed ... ... 50*l.*	The same payment as on a rent of 5*l.*, and also 20 per cent. on the excess beyond 5*l.*
Where it exceeds 50*l.* and does not exceed ... ... 150*l.*	The same payment as on a rent of 50*l.*, and 10 per cent. on the excess beyond 50*l.*
Where it exceeds ... ... 150*l.*	The same payment as on a rent of 150*l.*, and 5 per cent. on the excess beyond 150*l.*

Where a varying rent is payable, the amount of annual rent is to mean the largest amount of annual rent.

Purchaser's or lessee's solicitor for perusing draft and completing.	One-half of the amount payable to the vendor's or lessor's solicitor.

RULES APPLICABLE TO PART II. OF SCHEDULE I.

As to all Leases, or Conveyances at a Rent, or Agreements for the same, other than Mining Leases and Agreements therefor.

1. Where the vendor or lessor furnishes an abstract of title, it is to be charged for according to the present system as altered by Schedule II.

2. Where a solicitor is concerned for both vendor and purchaser, or

lessor and lessee, he is to charge the vendor's or lessor's solicitor's charges and one-half of that of the purchaser's or lessee's solicitor.

3. Where a mortgagee or mortgagor joins in a conveyance or lease, the vendor's or lessor's solicitor is to charge 1*l.* 1*s.* extra.

4. Where a party other than a vendor or lessor joins in a conveyance or lease, and is represented by a separate solicitor, the charges of such separate solicitor are to be dealt with under the old system as altered by Schedule II.

5. Where a conveyance or lease is partly in consideration of a money payment or premium, and partly of a rent, then, in addition to the remuneration hereby prescribed in respect of the rent, there shall be paid a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium.

6. Fractions of 5*l.* are to be reckoned as 5*l.*

SCHEDULE II.

INSTRUCTIONS FOR AND DRAWING AND PERUSING DEEDS, WILLS, AND OTHER DOCUMENTS.

Such fees for instructions as, having regard to the care and labour required, the number and lengths of the papers to be perused, and the other circumstances of the case, may be fair and reasonable. In ordinary cases, as to drawing, &c., the allowance shall be

For drawing	2*s.* per folio.
For engrossing...	8*d.* „ „
For fair copying	4*d.* „ „
For perusing	1*s.* „ „

ATTENDANCES.

	s.	*d.*
In ordinary cases	10	0

In extraordinary cases the taxing master may increase or diminish the above charge, if for any special reasons he shall think fit.

ABSTRACTS OF TITLE (WHERE NOT COVERED BY THE ABOVE SCALES.)

	s.	*d.*
Drawing each brief sheet of 8 folios	6	8
Fair copy	3	4

JOURNEYS FROM HOME.

	£	*s.*	*d.*
In ordinary cases for every day of not less than seven hours employed on business or in travelling	5	5	0

	£	s.	d.
Where a less time than seven hours is so employed ... ... per hour	0	15	0

In extraordinary cases the taxing master may increase or diminish the above allowance, if for any special reasons he shall think fit.

(Signed) SELBORNE, C.
COLERIDGE, C.J.
G. JESSEL, M.R.
E. HARVEY.

RULES UNDER THE ACT FOR THE ABOLITION OF FINES AND RECOVERIES, AND SECT. 7 OF THE CONVEYANCING ACT, 1882.

The costs to be allowed to solicitors in respect of the matters hereinafter mentioned, when not otherwise regulated by the general orders in force for the time being under the Solicitors' Remuneration Act, 1881, or by special agreement, shall be as follows :(*a*)

Charges under the 3 *&* 4 *Will.* 4, *c.* 74 (*the Fines and Recoveries Act*).

	£	*s.*	*d.*
For the endorsements on deeds required by the Fines and Recoveries Act, to be entered on the Court Rolls of Manors of the memorandum of production and memorandum of entry on Court Rolls, to be signed by the Lord Steward or Deputy Steward, each endorsement of memorandum, 5*s.* together	0	10	0
For entries on the Court Rolls of deeds and the endorsement thereon, at per folio of 72 words	0	0	6
For taking the consent of each protector of settlement of lands	0	13	4
For taking the surrender by each tenant in tail of lands	0	13	4
For entries of such surrenders or the memorandums thereof in the Court Rolls, at per folio of 72 words ...	0	0	6

(*a*) Rule 8. Previous rules hereon are repealed, except as to certificates not lodged before 1st January, 1883, of acknowledgments by married women of deeds executed before 1st January, 1883, on which day these rules come into operation. (Rules 9, 10.) Rules 1–6 will be found in the text of previous pages in their proper order.

ORDER AS TO COURT FEES.

1. The following portion of the schedule to the order as to Court Fees made on the 28th October, 1875, is hereby repealed, that is to say:

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
On taking acknowledgment of a deed by a married woman	1	0	0	6	0	0

And instead thereof the following fees shall henceforth be chargeable in respect of the matters hereinafter mentioned (namely):

Fees under the Act 3 & 4 Will. 4, c. 74 (the Fines and Recoveries Act).

	£	s.	d.
For taking the acknowledgment of a married woman by a Judge of the High Court of Justice	1	0	0
To a perpetual Commissioner for taking the acknowledgment of a married woman when not required to go further than a mile from his residence	0	13	4
To a perpetual Commissioner when required to go more than one mile, but not more than three miles, besides his reasonable travelling expenses	1	1	0
To a perpetual Commissioner where the distance exceeds three miles, besides his reasonable travelling expenses	2	2	0
Where more than one married woman at the same time acknowledges the same deed respecting the same property, these fees are to be taken for the first acknowledgment only, and the fees to be taken for the other acknowledgment or acknowledgments, how many soever the same may be, shall be one half of the original fees, and so also where the same married woman shall at the same time acknowledge more than one deed respecting the same property			
To the Clerk of the Peace or his deputy for every search	0	1	0

	£	s.	d.
To the same for every copy of a list of Commissioners, provided such list shall not exceed the number of 100 names	0	5	0
To the same for every further complete number of 50 names, an additional	0	2	6
For every official copy of a list of Commissioners, provided such list shall not exceed the number of 100 names	0	5	0
For every further complete number of 50 names, additional	0	2	6
For preparing every special commission	1	0	0
For examining the certificate and affidavit, and filing, and indexing the same	0	5	0
Upon the return of a Special Commission to the Central Office	0	5	0
For every search in the registry of certificates of acknowledgments of deeds by married women	0	1	0
For enrolling recognisances, deeds, and other instruments, per folio of 72 words, including the certificate of enrolment endorsed on the instrument, but not including maps, plans, and drawings, which are to be charged at their actual cost	0	1	0
For endorsing a certificate of enrolment on a duplicate of any enrolled instrument, for each folio of the instrument if it does not exceed 24 folios	0	0	6
For the like certificate if the instrument exceeds 24 folios	0	12	0
For office copies of enrolled instruments, per folio of 72 words	0	0	6
For examining copies of enrolled instruments and marking them as office copies, per folio of 72 words ...	0	0	2

Fees under Sect. 48 *of the Conveyancing and Law of Property Act*, 1881.

	£	s.	d.
On depositing a power of attorney	0	2	0
On an application to search for a power of attorney so deposited, and inspecting the same, and the affidavit or other documents deposited therewith, for each hour or part of an hour, not exceeding on one day 10*s.*	0	2	6

If an office copy is required, and it exceeds 2*s.* 6*d.*, the fee for search and inspection is to be allowed.

Copies of powers of attorney and other documents so deposited presented at the office and stamped or marked as office copies to be charged for as office copies.

2. The following fees, by the order as to Court Fees dated the 6th August, 1880, directed to be inserted in the schedule to the order as to Court Fees made on the 28th October, 1875, are hereby repealed:—

Searches and Inspections.

	Lower Scale. £ s. d.	Higher Scale. £ s. d.
For an official certificate of the result of a search in one name in any register or index under the custody of the Clerk of Inrolments, the Registrar of Bills of Sale, the Registrar Certificates of Acknowledgments of Deeds by Married Women, or the Registrar of Judgments	0 5 0	0 5 0
For every additional name, if included in same certificate	0 2 0	0 2 0
For a duplicate copy of certificate, if not more than three folios	0 1 0	0 1 0
For every additional folio	0 0 6	0 0 6
For a continuation search if made within 14 days of date of official certificate (the result to be endorsed on such certificate)	0 1 0	0 1 0

3. Instead of the fees so repealed, the following fees shall henceforth be chargeable in respect of the matters hereinafter mentioned, viz.:

Searches and Inspections.

	£ s. d.
For an official certificate of the result of a search in one name in any register or index under the custody of the Clerk of Enrolments, the Registrar of Bills of Sale, the Registrar of Certificates of Acknowledgments of Deeds by Married Women, or the Registrar of Judgments, if not more than five folios	0 5 0
For every additional folio...	0 0 6
For every additional name, if included in the same certificate	0 2 0
For an office copy of the certificate of search, if not more than three folios	0 1 0
For every additional folio	0 0 6

	£	s.	d.
For a continuation search, if made within one calendar month of date of official certificate (the result to be endorsed on such certificate)	0	1	0

4. This order shall come into operation on the 1st January, 1883.

(Signed) CHARLES C. COTES.
HERBERT J. GLADSTONE.
(Lords of the Treasury.)

(Signed) SELBORNE, C.
COLERIDGE, L.C.J.
G. JESSEL, M.R.
NATH. LINDLEY, L.J.
H. MANISTY, J.
EDW. FRY, J.

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